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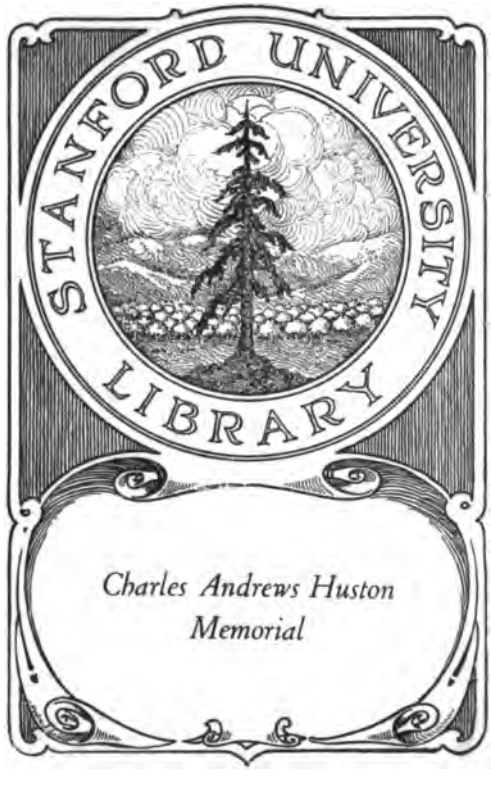
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Work of the Advocate

A PRACTICAL TREATISE

CONTAINING SUGGESTIONS FOR
PREPARATION AND TRIAL, INCLUDING A SYSTEM OF RULES
FOR THE EXAMINATION OF WITNESSES AND THE
ARGUMENT OF QUESTIONS OF
LAW AND FACT

BY
BYRON K. ELLIOTT
AND
WILLIAM F. ELLIOTT

Second Edition

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PREFACE TO THE SECOND EDITION

This book has been out of print for many years, and the publishers, finding a demand for it from many sources, have determined to publish a new edition of it. Advantage has been taken of the opportunity to revise the work and to add illustrations and suggestions gleaned from further reading, observation, and practical experience in the preparation and trial of causes. The authors, several years after the first edition was issued, became the trial lawyers, in Indiana, for a large railroad corporation, and have engaged in many trials of damage cases both for and against such corporations, as well as in the trial of miscellaneous cases in general practice. This additional experience has not only strengthened our faith in the importance of the practical suggestions originally made, but has also enabled us to add to such suggestions. Most of the additional illustrations, however, will be found in the notes.

The rules of law, which are intended to be suggestive and in outline rather than complete, are also amplified to some extent, and supported by the citation of many new cases. These rules and citations not only furnish a working system or outline, but also indicate how and where to find a fuller treatment of the law, or additional authorities or precedents, on specific subjects. This, indeed, is one of the principal purposes of the book, namely, to show how to use the lawyer's "tools" and find the law, as well as to furnish suggestions for trial practice and the conduct of actions at law.

BYRON K. ELLIOTT.
WILLIAM F. ELLIOTT.

September, 1911.

PREFACE TO THE FIRST EDITION

Many years ago the elder of the authors, impressed by a remark of Mr. Chitty's, became a close observer of the different methods pursued by advocates in the trial of causes. The scrutiny, as the investigation progressed, went beyond the facts open to the observer's unaided perception, and led to an inquiry into the habits of thought of jurymen. The position of the inquirer, at the time—that of trial judge—was such as to enable him to freely converse with the jurors and draw from them their opinions of the methods of the different advocates who came before them. The results of the investigation, both as to the method of examining witnesses and as to the course of argument by which jurors are influenced, are given in the pages which follow. It may, therefore, be justly said that as to these subjects, at least, this book is founded mainly on experience, although many books have been consulted in its preparation.

It has been the intention and the hope of the authors to give to the profession a book that shall be of service to the advocate in the actual work which he must do. It has been our purpose to treat of matters not usually discussed in works on pleading and practice. We have, as we believe, treated more of the things that abide in the unwritten practice than of those which are found in books. We hope that the young advocate will find suggestions of substantial value, and we even venture to hope that, while the advocate of experience may not find much in our pages that is new or instructive, he may, at least, find something of interest.

In collecting authorities we have regarded quality rather than numbers, and have referred to such cases as seemed best to illus-

trate the points upon which they are cited. We have examined many reports, and from the great number of cases have selected the latest and the most instructive. We have endeavored to make the book one that will be serviceable in actual practice—one to which the advocate may turn for instruction and information in the hurry and pressure of actual work. To that end we have made such suggestions, stated such rules and collected such authorities as bear upon the questions that most frequently arise in the preparation and trial of causes.

It is not without fear of censure that, in this day of many books, we submit our work to our brethren. We bespeak their charitable judgment, and, in mitigation of such errors as we may have fallen into, we plead that, for the most part, our path is one not much traveled by book-makers, and that it lies through fields of difficulty. If the book shall be of help to the young advocate we shall not regret the labor we have given it, nor greatly suffer from the censure its faults may bring upon us. We are bold enough to hope that the gratitude of the young advocate, whom it has been our leading purpose to help, will outweigh the censure of those who may think that we have added to the number of books without adding anything of value to legal literature.

BYRON K. ELLIOTT.
WILLIAM F. ELLIOTT.

INDIANAPOLIS, IND., August, 1888.

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THE WORK OUT OF COURT

CHAPTER I.

LEARNING AND PREPARING THE FACTS.

"Our first precept shall be: That whatever causes he undertakes to plead, he must acquire a minute and thorough knowledge of them."

—*Cicero.*

"My man, who is to succeed, must not only be industrious, but, to use an expression of a learned friend of mine, 'he must have an almost ignominous love of details.'"—*Arthur Helps.*

"He must not merely look to principles, but must have them in readiness to act upon them; not as if they had been taught him, but as if they had been born in him."—*Quintilian.*

Preparation is the foundation of success in advocacy. Neither genius nor talent, neither tact nor cunning, can equip an advocate to try a cause as it is the duty of advocates to try causes, without a foundation well laid by thorough and complete preparation. The first step is to acquire a knowledge of the facts. It is not enough to obtain a knowledge of them in outline; they must be known in their breadth and depth and in their relation to each other and to the ruling principles of law.[1] Knowledge less

[1] One of Great Britain's most successful advocates of modern times, Sir Charles Russell, afterwards Lord Chief Justice, described his manner of working as follows:

"First. I do one thing at a time, whether it is reading a brief or eating oysters, concentrating whatever faculties I am endowed with upon what I am doing at the moment. Secondly. When dealing with complicated facts, to arrange the narrative of events in the order of date—a simple rule not

thorough will not enable an advocate to acquit himself with credit nor will it enable him to do his duty to his client. Cicero says: "What Socrates used to say, that all men are sufficiently eloquent in that which they understand, is very plausible but not true. It would have been nearer the truth to say that no man can be eloquent on a subject that he does not understand."[2] No man can be strong where his knowledge of his subject is feeble. Preparation alone supplies the knowledge which makes trial lawyers strong.[3]

Biographers of advocates, like biographers of military heroes, sometimes take up the pen of the romancer, and, to magnify the man of whom they write, invent pleasant fictions. It is to this class of biographers that legal literature owes many stories of verdicts won, as they say, "by a flash of wit or a torrent of eloquence." There is more of rhetorical flourish than of sober truth in these stories. For the most part, legal controversies are not fields for display, but fields for hard work. The power of the advocate does, indeed, often carry the verdict, but the foundation of this power is preparation. The genius of success in the contests of the forum is the genius of hard work. The man who goes into

always acted upon, but which enables you to unravel the most complicated story, and to see the relation of one set of facts to another set of facts. My third rule is never to trouble about authorities or case law supposed to bear on a particular question until I have accurately and definitely ascertained the precise facts. My fourth rule is to try and apply the judicial faculty to my own case in order to determine what are its strong and weak points, and in order to settle in my own mind what is the turning point in the case. This method enables you to discard irrelevant topics and to mass your strength on the point on which the case hinges." 39 Alb. Law Journal 304.

[2] Orators and Oratory, Bk. I, xiv.

[3] As Daniel Webster told the preacher, "there is no such thing as extemperaneous acquisition." Judge Williams, of the Supreme Court of Pennsylvania, says: "It really is not an easy thing to try causes well. Some persons are better fitted for this work by nature or by education than others, but labor is nevertheless the price of success to all. It must be paid in advance. * * * In the first place, make early and careful preparation for every trial." Legal Ethics and Suggestions for Young Counsel, 115, 116.

the contests of the forum without careful preparation, relying on his wit or his eloquence, will go "sounding on a dim and perilous way." "Diligence," Cicero maintains, "is capable of effecting almost everything,"[4] and at no point in advocacy is diligence more powerful than at the outset. Diligence in preparation is, to borrow again from Cicero, the one virtue "in which all other virtues are comprehended."[5] The advocate cannot too strongly lay it to heart that preparation is absolutely essential to success. Speeches that are lauded as remarkable examples of extemporaneous speaking are almost always found, when the truth is known, to be the result of careful and laborious preparation.

Webster's reply to Hayne was not the result of a night's deliberation, but, as he himself said, was the product of long years of thought. If ever a man was gifted with genius great enough to make him disdain the aid of preparation, it was Daniel Webster, and yet he would not speak without preparation. The secret of his success is disclosed in the well-known anecdote which represents him as saying to a friend: "If there be so much weight in my words as you represent, it is because I do not allow myself to speak on any subject until my mind is thoroughly imbued with it."

Many other illustrations may be garnered from the gardens of biography and literature. Lord Brougham said that "to the end of a man's life he must prepare most of his finest passages," and his famous speech in Queen Caroline's case was the outcome of weeks of preparation.[6] Rufus Choate gave and followed the same advice. Demosthenes not only practised delivery and overcame his defective and stammering utterance, but also carefully and laboriously prepared his orations in advance of their delivery.[7] So, to give a "modern instance," James W. Gerard, the great New York "verdict getter," is said, in Clinton's "Extraordinary Cases," to have previously prepared his most striking and ap-

[4] Orators and Oratory, Bk. II, xxxv.

[5] Orators and Oratory, Bk. II, xxxv.

[6] Reminiscences of a K. C. (T. E. Crispe) 256. See also Matthews' Oratory and Orators, 183-186.

[7] Plutarch's Demosthenes; Rollins' Hist. Book 13, § 7.

parently impromptu effects and to have habitually made briefs in advance for his cross-examinations. The delightful style of Robert Louis Stevenson was acquired by patience and hard work; Macaulay's brilliant essays were the result of laborious research and much care; and few, indeed, are the men who have accomplished much without preparation and hard work.[8]

Those consummate masters of forensic oratory, Cicero and Quintilian, with strong words, often repeated; impress upon the advocate the necessity of a thorough study of the causes he undertakes. This study is even more important now than when they wrote, for men in these days look more to the words of the witnesses than to those of the advocates. In theory the truth comes from the witnesses, however it may be in fact, but in Rome this was scarcely so, even in theory. The study of the facts is not so much for the sake of the argument as these great authors teach, for it is essential in other particulars even more important. Preparation is not for the sake of the argument alone, but for the sake of the case, although it gives a strength and power to the argument that without it would be utterly wanting. Mr. Harris, employing the nomenclature of the turf, says, "In five cases out of six I would back the advocate and not the case."[9] But this, we venture to affirm, is not true of advocacy in America, whatever may be said of it as applied to the English practise, where the attorneys, and not the advocates, prepare the cases. The many instances in which the ablest advocates of England met defeat after the most splendid and skilful conduct of causes incline us to the belief that Mr. Harris somewhat exaggerates the power of the advocate. At all events, the American advocate who assumes the truth of this author's statement, and acts upon it, will find that he has leaned upon a broken reed. American judges and juries are made of "sterner stuff" than the English, if the remark of the English writer be true. The only safe rule for an advocate is to be sure that he has constructed a strong

[8] The books of Smiles, Matthews, Marsden, and others of a similar class are full of illustrations of what is said in the text. Lincoln said: "Work, work, work; that is the main thing."

[9] Illustrations in Advocacy, Chap. II, 1.

theory, and is provided with the essential principles of law and the necessary facts to maintain it. Neither judges nor jurors can be carried to a favorable conclusion by the mere work of the advocate in court, although much may there be done to turn the oftentimes doubtful fortunes of the contest.

Where the contest is not to be fought solely upon questions of law the advocate must make himself a master of all the facts. It is not sufficient that he gains a general knowledge of them; his duty is poorly done if he does not obtain a complete mastery of all the details.[10] Little things often decide big ones.[11] A hole in the bottom of a ship, even though it be not a large one, may work destruction as effectually as a great one; and a little hurt, though it be "not so deep as a well nor so wide as a church door," may cause death. Quintilian's advice is as valuable now as it was in the days when the Roman lawyers aroused the applause of listening multitudes in the Forum of Rome. The young advocate will be wise to study it with care, and even the veteran will find profit in often recurring to it.[12] The information gathered from the client is the basis of the investigation of the facts, and the counsel should draw from him all his knowledge of the facts as well as his inferences and hypotheses. Where the matters of which the client speaks are not susceptible of direct proof, or when they are not physical facts, it is well enough to ascertain the inferences and hypotheses that the client has framed; but these must not be accepted without having been thoroughly examined and tested, for

[10] "My man who is to succeed," says Sir Arthur Helps, "must not only be industrious, but, to use an expression of a learned friend of mine, he must have an almost ignominious love of details." The advice of Coleridge is also wise: "Accustom your mind to distinguish the relation of things from the things themselves." Coleridge's Works (edited by Shedd.) vol. 6, page 142.

[11] "Trifles," said Michael Angelo, "make perfection, and perfection is no trifle." And, as Oliver Wendell Holmes says, "Life is a great bundle of little things." So, Webster said, in praise of Judge Parsons: "'Tis not enough for him that he has learned the leading points of a case, he must know everything." Harvey's Reminiscences of Webster, 82.

[12] Quintilian's Inst., 7, 8, 12, 13. Cicero's course was much like that which Quintilian commends. Orators and Oratory, II, xxiv.

it is to be expected that the interest of the client will so bias his mind that his mental processes will neither be accurate nor just. But the advocate's duty is not at an end when he has examined, no matter how exhaustively, his client; he must see and talk with his witnesses. In this respect the American lawyer has a great advantage over the English barrister, for the strict rules of English practise prevent the barrister from holding a personal interview with the witnesses.[13]

Lord Tenterden said: "It is of the very greatest importance, as regards the result of a trial, that the principal attorney himself should, in due time, examine the witnesses and take down the result in writing."[14] Mr. Chitty's advice is that, "Either the principal or a very experienced clerk, who will afterward attend at the consultation and to the conduct of the cause at the trial, and who will be above the suspicion of tampering with the witnesses, should personally, and in the absence of his client, see and examine each witness apart from the other, so that one may not influence the other as to the exact testimony he will give, and he should particularly inquire whether he has any interest in the event of the action, or whether there are any circumstances which might affect his competency in the opinion of the judge or his credit in the estimation of the jury."[15]

The chief purpose of the preliminary examination of the witnesses is, doubtless, to obtain a knowledge of the information they possess; but another purpose, scarcely less important, is to secure a knowledge of each witness. Witnesses differ very greatly in their mental characteristics and habits of thought, and one

[13] In this respect the French practice is the same as that of the American advocate. Hist. French Advocates.

[14] And as it seems to be human nature to take sides so that the first party to enlist the sympathy of a witness is the party whose side he is most likely to espouse, the advice has been given, with emphasis, to interview the witnesses as soon as possible and get their statements or version of the facts before they have become biased, and, at all events, not to let the opposing counsel to be the first to interview witnesses that might naturally be favorable to your client. Archer's Law Office & Ct. Proc. 12, 13, § 10. See also, Wellman's Art of Cross-Examination, 150, 151.

[15] 3 Chitty General Practice, 821.

method of examination will not be successful with all. To successfuly examine a witness the advocate should know the person with whom he has to deal. He should mold his method of examination to the temperament and intelligence of each witness that comes upon the stand. There will be the dull witness to be drawn out with plain and homely questions slowly put, the impulsive witness to be subdued and checked, the timid witness to be encouraged and supported, the swift witness to be controlled and kept to the facts. The advocate who has seen the witnesses face to face, and has formed his judgment of their capacity and temperament, will be much better qualified to examine them in the trial than one who sees them for the first time in the court-room. There is still another advantage to be gained from a personal contact with the witness, and that is this: the witness having once been examined by the advocate feels confidence in himself, as he knows that he will not be conducted over treacherous grounds nor led into dangerous places.[16] So, too, a personal interview with the witnesses enables the advocate to determine whether it is best to fully develop the testimony of the witness on the direct examination, or trust to the cross-examination to bring out with more strength and in fuller detail the facts within the knowledge of the witness.[17] It is sometimes expedient to leave much for the cross-examination, for a material fact elicited on cross-examina-

[16] As an example or illustration of the benefit and confidence obtained by such a course, see Webster's handling of the witness Phelps in the Smith will case. Harvey's Reminiscences of Webster, 108.

[17] Substantially the same advice, based on somewhat similar reasoning is given by Judge Williams: "If possible sit down with your client and go carefully over all the facts. Assure yourself by careful questioning that your client has given you all of his case, and just as it really is, without exaggeration or concealment. Take up the list of the witnesses to see that you have the names of all, and the facts to which the attention of each is to be called. Having gotten all the help your client can give you in this manner arrange to have the important witnesses brought to your office, that you may satisfy yourself not only of the extent of their knowledge, but of their leanings for or against your client. You will be able at the same time to notice their peculiarities, their degree of intelligence, their habits of speech, and their general appearance, so that you may arrange the order and manner of their examination in that way that shall make the best pos-

tion strikes harder and cuts sharper than when brought out on the direct examination; but as there is always a great hazard in this course, it is only to be adopted when the way is plain and clear.

What is seen is more strongly grasped by the mind and more firmly retained by the memory than what is heard.[18] Hooker says: "That which we drink in at our ears does not so piercingly enter as that which the mind doth conceive by sight." It is not easy for even the best trained mind to get a clear conception of a place or of a physical thing from a description given in words. The impression produced upon the mind by an inspection of the place or thing involved in a legal controversy is much more accurate and enduring than that produced by a verbal description, no matter how accurate and vivid the words employed. It is for this reason that "real evidence," consisting of the thing in question, produced in court, the exhibition of a wound or an injury to the jury, or the like, is usually so effective; and the failure to produce it may sometimes give rise to an adverse inference.[19] Counsel should, therefore, be prepared to produce such evidence in a proper case. There is also much force in Mr. Chitty's suggestion, that it is "very material to have maps, plans, or even models of lands, water-courses and buildings carefully prepared and their correctness proved by the artist; and many important cases have, for the want of the information thereby given, failed on the trial."[20] The information imparted by maps, plans, and the like, is necessary to give the counsel, who is preparing his theory of the case, a full and clear view of the evidence, as well as to assist him in getting the jury to understand the

sible use of the materials at your command." Williams' Legal Ethics and Suggestions For Young Counsel, 117, 118.

[18] Ram on Facts, 37. As Tennyson says: "Things seen are mightier than things heard." Or, as Horace puts it:

"Segnius irritant animos demissa per aurem,
Quam quæ sunt oculis subjecta fidelibus."

[19] McCarthy v. Claflin, 99 Me. 290, 292, 59 Atl. 293; Ewing v. Goode, 78 Fed. 442, 450. See also, City of South Bend v. Turner, 156 Ind. 418, 60 N. E. 271, 275.

[20] 3 Chitty's General Practice, 852.

evidence in its full force. Accuracy and fidelity must be insisted upon in the preparation of maps and plans, and the person who prepares them must be required to make them clear and plain so that they can be readily understood by the jury. The art of photography may often be made very useful, both in preparing and in presenting the case. Mr. Irving Browne has collected a number of cases in which the art of the photographer rendered important assistance in judicial investigations.[21]

On the ground of prudence, if on no other, it is better not to make suggestions to the witnesses that may lead them to give false testimony, or corruptly color their statements. The witness who feels that an advocate, even though friendly to him, knows that he is testifying falsely, has not and cannot have that consciousness of safety that gives strength to the testimony of a witness who feels that his wrong is known only to himself; nor can such a witness so well withstand the fire of a cross-examination. A witness invited by the demeanor of the counsel in the private examination to color his testimony is not likely to maintain himself upon the stand, and jurors and judges are quick to observe and distrust a witness who seems ill at ease. It is better to keep the witness on the solid ground of truth, even though the question be viewed as one of expediency merely, for when that ground is left the witness is in danger, especially if he is aware that his turpitude is known to another. The "coached" witness is almost always a bad one. But no advocate ought to be guided by the mere dictates of prudence in such a matter; his sole guides should be honor and integrity. The client may have a

[21] Humorous Phases of The Law, 413; Locke v. S., C., &c. R. Co., 46 Iowa 109; Conley v. People, 83 N. Y. 464; Ebron v. Zumpleman, 47 Texas 503, 26 Am. 315n; Leathers v. Salvor Wrecking Co., 2 Wood (C. C.) (U. S.) 682; Udderzook v. Commonwealth, 16 Pa. St. 340; Blair v. Pelham, 118 Mass. 421; Cozzens v. Higgins, 33 How. Pr. (N. Y.) 439; Church v. Milwaukee, 31 Wis. 512; Duffin v. People, 107 Ill. 113, 47 Am. 431. See also 2 Elliott Ev., §§ 1224-1228, and leading articles in 31 Cent. L. Jour. 414, 41 Cent. L. Jour. 92, 5 Green Bag 15, 60, note in 75 Am. St. 468, 479, note in 35 L. R. A. 802. Reproduction of sound by phonograph has also been held admissible. Boyne City, &c. Co. v. Anderson, 146 Mich. 328, 109 N. W. 429.

right to his talents and skill, but not to his conscience and integrity. Nor will a departure from the path of honor lead to good results, for no man that really possesses the character and talents requisite to a true advocate can justly and ably present a cause where he knows that he has corruptly engaged in the fabrication of testimony. A guilty conscience weakens power, and the advocate who must praise a witness can only do so with half a heart when he knows that he is in league with him in a criminal scheme. Power and guilt are seldom allies. If the advocate has been guilty of a criminal or dishonorable act it will much impair his power, for, like the thief who sees an officer "in every bush," little things will terrify him, the fear of detection will unnerve him, and in the effort to shield himself he will lose sight of the important points of his cause.

Nothing makes an advocate so powerful as to feel that he is strong in his own integrity, and few things weaken him more than the dread that a witness may, through the pounding of the cross-examination, or through an inadvertent remark, expose the guilty effort to fabricate testimony. One great reason for the success of Rufus Choate was his deep conviction that he was in the right, for in Ashton's case he said: "I care not how hard the case is—it may bristle with difficulties—if I feel that I am on the right side, that case I win."[22] It is not difficult for the advocate who is himself upright and honest to reach the conclusion that the client is in the right, for men naturally repose confidence in those who come to them for counsel and assistance, and this feeling grows as the relationship continues. All men grow earnest in behalf of the persons whose cause they espouse; they believe only what is good of them, and reject the evil that is said of them. This is exemplified in politics and in religion, for good men will stand by their parties and their leaders, although strong evidence tends to prove them corrupt. The advocate ought not to weaken the confidence he will naturally have in the justice of his client's

[22] And a witty English lawyer, now on the bench, says: "It is in getting a verdict, as in getting anything else; you will obtain it the more easily if you know of no reason why you should not." Scintillae Juris., 12. See article on Judge Darling in 22 Green Bag 667.

cause by any corrupt act of his own, for to the extent that his confidence is weakened, to that extent is his real power diminished.

Mr. Chitty, in speaking of the preliminary examination of witnesses, gives this excellent advice: "Every honorable practitioner at all events will take care that no part of his client's intercourse with the witnesses can have the least influence upon him to give his testimony otherwise than strictly according to the truth, and without evincing the slightest partiality to either party. Indeed, in prudence and in policy this is of the utmost importance to the client's interests, because the least improper interference with a witness might so disgust a jury as to induce them to find a verdict against a client, although law and justice might, on the whole, be in his favor."[23] If it appears to the jury that one witness has been corruptly tampered with, a suspicion is engendered against both client and counsel that it is very difficult to remove, and, indeed, one that is often impossible to displace. The jurors reason that, if one witness has been corruptly influenced, others have also been probably tampered with, and a feeling akin to anger is aroused which works infinite mischief, for jurors, like other men, quickly become indignant if it appears to them that there has been an effort to impose upon them. A bad witness does more harm to a cause than many good ones can repair. A good case may be irretrievably ruined by one bad witness, for men are apt to conclude, and not without reason, that a man who has done one bad act will likely do many more. It is, therefore, of great importance to prevent any suspicion that the witnesses have been in any way corruptly influenced, as well as to prevent any suspicion that they have had stories made up for them, or that one witness has been prompted by another. In order to prevent such a suspicion counsel and client must be scrupulously careful and circumspect in their intercourse with the witnesses.

It is as imprudent as it is dishonorable to "coach" or "tutor" a witness, but there are matters about which he may honestly and

[23] 3 Chitty General Practice, 825.

with entire propriety be cautioned.[24] It is not improper to caution a quick-tempered witness to be careful to keep his temper under control, nor is it improper to direct him to be respectful to opposing counsel, and to avoid flippant or "smart" remarks. So it is well when learning the facts from witnesses to state to them that you simply want them to tell the truth, and before the trial to caution them that if they are asked by opposing counsel if they have ever talked with anybody about the case they should answer truthfully and not be embarrassed by such questions, as they have a perfect right to talk to counsel.[25] It is good practise to direct a witness to treat the judge with deference, to be decorus in his behavior, and to avoid boisterous conduct or unseemly levity. So, too, it is proper to admonish him that he has a right to fairly understand all questions that are addressed to him, and that, as it is his privilege to be allowed to fully comprehend the question, he may ask that it be repeated or made plain; and so, too, it is proper to inform him that in giving a conversation he should, as nearly as he can truthfully do so, give the exact words used. It is also proper to direct him that he should give responsive answers to the questions propounded to him, and not wander to other matters. It is suggested by Mr. Chitty—and few men were better qualified to give advice than he—that, "It may be of considerable importance that witnesses, especially females, unaccustomed to courts of justice, should for a day or two, or at least a few hours, before the expected trial attend court, so that

[24] Robinson's Forensic Oratory, 3183; Munson's Manual of Elementary Practice, §§ 174, 176. See, however, Matter of Eldridge, 82 N. Y. 161.

[25] It is a favorite or common practice of some counsel on cross-examination to ask such questions with a view of embarrassing witnesses, and it sometimes has that effect. The authors made it a practice of pursuing the course advised in the text, yet in one case a witness on being asked on cross-examination if he had ever talked with any one about the case, answered that he had not. We questioned him afterwards as to why he had so answered, and the only explanation we could get was that he did not understand that the cross-examiner meant to include a talk with counsel. It is evident that a witness would not ordinarily be called unless he had talked with some one about the case, or shown in some way that he knew something about it. See also Warvelle's Legal Ethics, 116, § 187.

by the observance of the demeanor of others they may be better prepared to overcome the sensation of alarm which would otherwise frequently incapacitate them from giving their evidence in a proper manner."[26]

It is the duty of the advocate in the consultation with the witnesses to draw from them all the facts of which they have knowledge. He must keep in mind that it is the facts, and not the inferences of the witnesses, that he seeks, and he must steadily, and sometimes sternly, keep the witness to the facts. They must be made to understand that they are to state the facts, and not their theories or conclusions. When a fact is stated, and the advocate has no reason to suspect that the statement is untrue, then he should lead the witness by fair and honest questions to recall all the little circumstances that fasten it in his memory, and give it probability. A naked fact, however positively stated, often seems improbable; but when surrounding circumstances are detailed its probability is firmly established.[27] So, too, it often appears highly improbable that a witness should accurately remember a fact, yet when all the circumstances are developed the reason for its having fastened itself in his memory will satisfactorily appear.[28] Another advantage that this method secures is that it strengthens the memory of the witness, for, upon the familiar doctrine of association, one thought recalls another with which it was once associated, and so the mention of one fact often recalls another which had almost entirely faded from memory.

It is prudent, as well as honest, to admonish the witnesses in the private interview with them that you expect of them a true statement of the facts of which they have knowledge. This is prudent because it often happens that the witness will be asked on cross-examination to whom he made the statement given by him

[26] Chitty General Practice, 825. See also, Williams' Legal Ethics and Suggestions for Young Counsel, 118.

[27] See Grant v. Bradstreet, 87 Me. 583, 33 Atl. 165; Stever v. New York Cent. &c. R. Co., 7 App. Div. (N. Y.) 392, 39 N. Y. S. 944; Sterrett v. Wright, 27 Pa. St. 259, 261.

[28] See Commonwealth v. Roddy, 184 Pa. St. 274, 290, 39 Atl. 211, 213; Clark v. Clark, 52 N. J. Eq. 650, 30 Atl. 81, 84; Wickwick v. Powell, 4 Hag. Ecc. 328, 343.

on the witness stand. To avoid unjust inferences arising from the probable answer that it was made to the advocate, it is well enough to be able to show that he was cautioned to tell the truth and give only the actual facts within his knowledge, and it is honest because it apprises the witness that you want to hear only the truth.

In cases where written instruments form important matters of evidence, the safe course is to always demand and secure an inspection of them before trial.[29] A close examination of written documents may often lead to important results and supply material assistance to the advocate, both by advising him of danger to be encountered and by enabling him to detect the fabrication of evidence by the manufacture of false documents, or the alteration of genuine ones. There are cases in the books where the manufacturer's imprint upon the paper showed that the document purported to bear a date long anterior to that at which the paper upon which it was written was manufactured.[30] When there is serious doubt as to the authenticity of a document it is prudent to investigate the character of the paper on which it is written, and, if possible, ascertain when and where it was made. One case has come under our observation where it appeared that words of an important character were printed by types not manufactured until some years after the date affixed to the instrument. In another case given in the books an instrument was produced purporting to have been executed in a county which was not in existence until long after the date which the instrument bore. Where instruments are important it is unsafe to depend upon copies,

[29] For the practice and rules governing discovery and inspection of documents, see 2 Elliott Ev., Ch. LXVIII, §§ 1384-1416. See also, I Greenl. Ev., §§ 559-562.

[30] In 1 Elliott's Gen. Pr., § 15, two illustrations of the importance of investigating such matters are given. In one of them a book had been stolen and the thief had written in it as the date of purchase, 1884, and the title page gave the date of publication as of 1880, but in the body of the book was a reference to a law enacted in 1886. In the other, election returns had been tampered with and the bag containing them resealed, but the wax had been heated with a tallow candle light, as shown by the tallow in it, instead of being heated over an oil lamp as it was originally.

since it not infrequently happens that the copyist has fallen into an unintentional error, or has intentionally interpolated or omitted important clauses.[31] Few things are more hazardous than to rely upon a client's representation of the contents of a written instrument, for, in the great majority of cases he gives, not the language of the instrument, but his own construction of it. The construction of written instruments, whether wills, deeds, or agreements, is a work of great difficulty, often perplexing the best lawyers and most experienced judges, and no advocate does his duty unless he himself carefully studies and cautiously weighs all the important words contained in a written instrument.[32] In order to do this successfully he must get into his mind clearly, fully, and accurately the circumstances surrounding the parties at the time of its execution. A dim and indistinct view will not enable him to give it a construction satisfactory to himself, and unless there exists in his own mind a strong, clear, and decided conception he will miserably fail in the effort to convey to a court or jury a just idea of its force and meaning. Instruments would almost always be obscure if it were not for the light which attendant circumstances cast upon them—in many cases, indeed, would be utterly unintelligible but for that light. It often requires close investigation to discover the circumstances which supply the light, and when they are discovered the full benefit from them can be obtained only by a skilful arrangement that will pour their light upon the dark places.

The circumstances of a case require the most careful scrutiny and the most rigid analysis, for circumstances often create probability, and probability is a prime factor in all forensic contests. Positive testimony, if inherently improbable, will often be of little value, and circumstances will frequently control cases as against positive testimony.[33] In truth, it is the circumstances that give

[31] Wilson v. Tucker, 3 Starkie, N. P., 154.

[32] This is also generally necessary in order to construct a proper theory of the case.

[33] See Observations of Chancellor Spragge in Day v. Brown, 18 Grant Ch. (U. C.) 682, 683; and of Lord Westbury, in Nelson v. Betts, L. R. 5 Eng. & Ir. App. Case 1, 20; and for illustrative cases see cases cited in 1 El-

color and character to all complicated cases. Circumstances constitute the atmosphere of complex causes. The task of an advocate cannot, therefore, be considered at an end when he has ascertained what direct evidence can be adduced. There remains, in all complex cases, at least, the work of ascertaining whether the direct evidence is, or is not, probable, even though it may appear that direct testimony can be adduced upon every material point. "Probability," says Dr. Campbell, "is a light darted on an object from the proofs, which, for this reason, are pertinently enough styled evidence." It is this light which must be obtained from the circumstances and cast upon the testimony of the witnesses.

There is much truth in what Aristotle puts into the mouth of the advocate who can call no witnesses: "Let him also say that it is impossible to lead probability astray on the score of money, and that probability is never detected bearing false testimony,"[34] for it is true that probability is one of the most difficult things for money to secure or motive to create. In many cases circumstantial evidence will be the only kind that can be obtained, but circumstantial evidence is often more satisfactory than direct evidence can be. Whether the evidence be direct or circumstantial it is necessary to prove such circumstances as make the evidence probable, for circumstances create probability and probability secures verdicts. In searching for the circumstances of a transaction the minutest and closest attention to details is requisite, for it is little things, carefully gathered together and skilfully grouped, that create probability. There are few things in the abstract sciences,[35] or, for the matter of that, in any of the affairs of life, that can be proved with absolute certainty; the highest certainty that can be attained falls far short of mathe-

liott Ev., § 35, note 29, and in 4 Elliott R. R. (2d ed.) 1703; also Gorman v. Hand Brewing Co., 28 R. I. 180, 66 Atl. 209; Rothe v. S. E. Barrett Mfg. Co., 96 Wis. 615, 71 N. W. 1034; Stafford v. Chippewa Valley Elec. R. Co., 110 Wis. 331, 349, 85 N. W. 1036; Quock Ting v. United States, 140 U. S. 417, 35 L. ed. 501, 11 Sup. Ct. 733.

[34] Aristotle Rhet., Chap. XV.

[35] Mr. Sidgwick philosophically discusses this subject. Fallacies, 35, 225, 221.

matical demonstration. The contests of the forum are battles of the probabilities. In the ordinary affairs of life, whether in matters of commerce or mechanics, whether in matters of law or medicine, men can do no more than reach probable truth. Dr. McCosh says: "It is in vain to expect demonstration in every line of inquiry. Demonstration is confined to a limited class of objects, and these characterized by their simple and abstract nature. In most of the sciences it is not available; it cannot be had in chemistry, in natural history, in psychology, in political economy. In the practical affairs of life no man looks for it. If a man's house is on fire he will proceed to pour water upon it, though it cannot be demonstrated, in the technical sense of the term, that the water will quench the flame."[36] The testimony upon which the advocate relies must appear to be not merely possibly true, but probably true, for there is a wide difference between probable and possible truth.[37] The probability which carries conviction in courts of justice is not the probability of poetry and romance, which has been not inaptly denominated "the possible probable," but that probability which approaches as near as possible the real, absolute truth.[38] That may be deemed probable which is consistent with human knowledge and experience, and that may be regarded as improbable which is against the experience and knowledge of mankind. This, however, is a general rule to which there are many and notable exceptions, but it is one upon which it is safe to proceed in the very great majority of cases. It is this sort of probability to which Mr. Harris refers when he says: "Probabilities, therefore, are the mainstays of evidence; are, in fact, the evidence."[39]

Archbishop Whately says: "To infer, then, is the business of

[36] Logic, 160. See also, Locke, Human Understanding, Book 4, Ch. 15, § 4, quoted in Chicago &c. R. Co. v. Pritchard, 168 Ind. 398, 412, 79 N. E. 508, 81 N. E. 78.

[37] Wills on Circumstantial Evidence, 6–10; Ram on Facts, 116.

[38] Aristotle Rhet. (Bohn's ed.), 425, n. But proof has been said to be a stronger term. Brown v. Atlanta &c. R. Co., 19 S. Car. 39.

[39] Illustrations in Advocacy, 95.

the philosopher; to prove, of the advocate. The former from the great mass of known and admitted truths wishes to elicit any valuable additional truth whatever that has been hitherto unperceived, and, perhaps, without knowing with certainty what will be the terms of his conclusion. The advocate, on the other hand, has a proposition put before him, which he is to maintain as well as he can. His business, therefore, is to find middle terms (which is the *inventio* of Cicero); the philosopher's, to combine and select known facts or principles suitably for gaining from them conclusions which, though implied in the premises, were before unperceived. In other words, for making logical discoveries."[40] This is a narrower view of the duties of an advocate than our American practise warrants, if not, indeed, narrower than that warranted by the English practise. An advocate must both infer and prove; from established facts he must infer probable conclusions, and these he must prove to the jury. The work of inferring must precede that of proving. Direct evidence furnishes the advocate the materials out of which to construct his inferences; from these materials he must infer conclusions, and these he must prove in argument. The conclusions of fact essential to the maintenance of an issue must first be inferred and firmly fixed in the mind of the advocate before he can prove them to the triers of his case. So that the work of inferring is quite as important to the advocate as to the philosopher. There are many cases where this work is one of great difficulty and importance, and where success depends upon the care and skill with which it is done. There are, indeed, comparatively few contested cases where the work of inference is not of prime importance, for, in almost all cases, the direct evidence must be supplemented by inferences resulting from it. The necessity for securing a clear and accurate knowledge of the facts from which the inferences are to be drawn, as well as of conducting the process, is an imperious one, for if the facts which constitute the premises are not correctly stated, the inferences will be invalid.

While the process of inference is a legitimate one, and while

[40] Logic, Book IV, Chap. iii, § 1.

verdicts may be, and often are, based upon inferences,[41] it must be kept in mind that there must be evidence of the circumstances from which the inferences are drawn. There can be no valid inference where there is no evidence establishing the facts upon which the reasoning proceeds.[42] This doctrine is admirably presented by the Supreme Court of the United States in United States v. Ross, 92 U. S. 281, 23 L. ed. 707, where it was said, in speaking of inferences from unproved facts: "They are inferences from inferences, presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Evidence, p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.'" It is, therefore, essential that the advocate should search for and secure evidence of the circumstances which he expects to make the basis of his inferences. There must be a visible connection between the circumstances proved and the inferences sought to be drawn from them. "The law requires an open and visible connection between

[41] 1 Greenleaf's Evidence, § 13; Union Mutual Ins. Co. v. Buchanan, 100 Ind. 63; Hedrick v. D. M. Osborne Co., 99 Ind. 143; Indianapolis &c. R. Co. v. Collingwood, 71 Ind. 476; Western Travelers &c. Ass'n v. Holbrook, 65 Neb. 469, 91 N. W. 276, 94 N. W. 816; Kruest v. Bullock, 59 Wash, 141, 143, 109 Pac. 329, 330; Ram on Facts, 283-300. See also, 1 Wig. Ev., §§ 24, 30, *et seq.*

[42] Chambers v. Hunt, 3 Harr. (N. J.) 354; Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. 486; Gates v. Hughes, 44 Wis. 336; see also, Chicago &c. R. Co. v. Rhoades, 64 Kan. 553, 68 Pac. 58; People v. Harris, 136 N. Y. 423, 33 N. E. 65. Verdicts cannot be based on mere conjecture. Cleveland &c. Ry. Co. v. Miller, 149 Ind. 490, 508, 49 N. E. 445; Anderson v. Wapello County (Iowa), 131 N. W. 684; Hyer v. City of Janesville, 101 Wis. 371, 77 N. W. 729; Sherman v. Menominee &c. Co., 77 Wis. 14, 22, 45 N. W. 1079.

the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."[43]

There is an essential difference between facts and evidence,[44] and it is necessary to carefully discriminate between the evidence and the facts in preparing for trial, in drafting the pleadings, and in arguing the cause. An advocate who should do nothing more than rehearse the evidence delivered on the trial would make poor progress toward securing a verdict, for, if he would carry the jury, he must dig out from the mass of evidence the controlling facts, skillfully array them, and clearly and strongly place them before the jury. Evidence consists of the marks of facts, and whether a fact is or is not established by evidence depends upon the plainness and sufficiency of the marks which the evidence impresses upon it. One who looks below the surface of things will find that the skillful advocate, in ascertaining the facts from the evidence, proceeds upon the logical doctrine that what has the marks of a thing is the thing itself. If the logical rule were more often kept in mind and followed the conclusions of fact drawn from the evidence would more often be accurate. A fact can only be recognized through signs or marks, and the place to look for those marks or signs is in the evidence. In strictness, the fact itself is never found, but only the marks and signs, and it is for these that search must be made.

The word "fact," as used in legal proceedings, is not synonymous with "truth," for it means no more than an event, occur-

[43] United States v. Ross, *supra;* Cunard S. S. Co. v. Kelley, 126 Fed. 610, 61 C. C. A. 532; Best on Presumptive Evid., 95; Douglass v. Mitchell, 35 Pa. St. 440; Richmond v. Nicken, 25 Vt. 326; 1 Elliott Ev., § 89; Hammon Ev., 64; but see Hinshaw v. State, 147 Ind. 334, 47 N. E. 157; 1 Wig. Ev., § 41. In Thayer v. Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718, 721, where it was sought to base a presumption of negligence in failure to repair a roof upon evidence of its fall and that such a roof would customarily hold for several days after beginning to break loose, the court said that entirely too much was left to conjecture and inference on the issue of the defendant's failure to repair and held that there was not sufficient evidence to take the case to the jury on that issue.

[44] Clay v. Simonsen, 1 Dak. 403; Parks v. Satterthwaite, 132 Ind. 411, 32 N. E. 82.

rence, circumstance, or mental state.[45] An English author says, in substance, that "fact is anything that is the subject of testimony;"[46] but this is too vague a definition to be of practical value, and, besides, it is too broad, for it includes matters of opinion. Mr. Burrill says that, "However paradoxical it may appear, there may be such things as false facts," and he proves the truth of his statement by reference to cases where facts have been fabricated.[47]

The preparatory investigation is prosecuted for the purpose of securing the ruling facts of the case, and not merely for the purpose of gathering a mass of evidence. Facts more potent than those apparent from the positive testimony are secured by a process of inference. The search, if properly conducted, will be for the ultimate facts which rule the case, and to obtain these the searcher must infer, from facts stated to him, his own conclusions. The inductive process is the primary one. A number of particulars are brought together, and from these inferences are made. It is obvious that without a knowledge of the particulars the facts can not be known, and one who is ignorant of the facts, though he may know something of the evidence, can not take the first step in the preparation of the theory of the case. The conclusions will be of little avail if drawn only in shadowy outline, for the outlines must be bold, and the foreground and background must be laid out in the mental conception as in a picture. If no more than a dim, indistinct view of the facts is secured the advocate will make but a lame and halting progress in determining upon the theory he will adopt, and without a skillfully constructed theory he will go stumbling through the contest.

The rules of induction must be carefully observed, and the particulars relied on must be sufficient in number and character to

[45] Stephen Introduction to Indian Evid., Chap. II; Stephen's Digest Law of Evidence, Art. I; G. C. Lewis, Influence of Authority in Matters of Opinion, Chap. I; Burrill Cir. Evid., 218; Austin's Juris., § 499; Wilson's Logic, 213. See also, Drake v. Cockroft, 4 E. D. Smith (N. Y.) 34; Lawrence v. Wright, 2 Duer (N. Y.) 673.

[46] Ram on Facts (3 Am. ed.), 17, and notes.

[47] Burrill Circumstantial Evid., 219.

Swift used the word "fact" in the same sense as the lawyers do, for he says in one of his works, "The fact was false."

supply a substantial foundation for the conclusions of fact. The famous Tichborne case affords a striking illustration of the gathering together of a multitude of particulars, and from them inferring the conclusion that the claimant was the butcher, Arthur Orton, and not the baronet, Roger Tichborne. Many of the sketches of Edgar A. Poe are wonderful exhibitions of the talent of inferring a conclusion of fact from circumstances, and well deserve the study of the advocate. All the great thinkers in physical philosophy were masters of the inductive process, and few better illustrations of the practical application of the principles of inductive reasoning can be found than those exhibited in their works. The careful and keen discrimination that discovers the material particulars which support the conclusion sought, and rejects, by elimination, the irrelevant elements, is as important to the lawyer as to the philosopher, and material assistance may be obtained by the former from a study of the works of the latter. The advocate who gathers a multitude of particulars together, and does not infer conclusions of fact from them, makes no more real progress than did the naturalists of old, who never ascended above particulars to general conclusions. Without careful and discriminating inductive reasoning, generalization is impossible, and without logical generalization it is not possible to ascertain to what class a case belongs, or by what principles it is governed.

The witness should, as a general rule, be allowed to tell his own story, keeping him, however, with a gentle but firm hand to the facts. It is especially necessary to be vigilant in obtaining testimony of oral conversations, for witnesses are prone to give their own conclusions rather than the words actually used by the parties. An eminent and experienced judge says: "With reference to all evidence of conversations, you must bear in mind this: that where the evidence depends on the very words used there is a possibility that the witness may be clothing in his own language that which he thought was meant, when if you had the very words which had been originally uttered, you might come to the conclusion that something else was intended."[48] A witness who gives his

[48] Sir C. Cresswell in Keats v. Keats, 28 L. J. Mat. Cases, 169; 1 Pulling on Attorneys, 193.

own conclusions, and not the words, does much injury to a case, for a cross-examination will disclose his error, and the jury will be very apt to look upon him as a corrupt witness who has endeavored to supplant with his own inferences the words used by the parties. The mischief may extend further than the breaking down of the witness, because the inference of the jury will very likely be, that the party by whom the witness was introduced meant to impose upon them by placing before them the testimony of an untruthful witness.[49] Jurors are very sensitive, and warmly resent any effort to deceive them, not only because it discredits their intelligence, but also because they respect fair and open measures.

It is in obtaining evidence of oral conversations, more, perhaps, than elsewhere, that the danger lies of bringing reproach upon the advocate's client and cause, for witnesses are almost always favorable to the party who calls them, and this feeling induces them to conceal or color parts of a conversation; but, as the adverse party is entitled to the whole conversation, it is wrenched from the witness on cross-examination, and when it comes in that manner it falls heavily upon the party by whom the witness was called. It is better to know of the unfavorable evidence in advance of the trial, since this will allow time to secure explanatory or nullifying evidence, and will prevent the discomfiture that a surprise often causes. It is safer to meet unfavorable evidence boldly and openly than to attempt to evade or conceal it, so that even if the advocate proceeds on no higher ground than that of policy, he should encounter the adverse evidence in the open field. Boldness and frankness will succeed where artifice and cunning will fail. For these reasons, it is well to draw from the witness, in the preliminary examination, all of the conversation, and not leave it to the cross-examination to develop it in detail for the first time. If the witness is reluctant to give it in full, he must be plied with questions, such as a cross-examiner would employ, to bring it out uncolored by his own impressions, and in full.

There is an essential difference between the work of gathering the materials and the work to be done in developing and present-

[49] And it has been said that "a witness disbelieved is a witness against you."

ing the case in court. In prosecuting the preliminary investigation the facts must be scrutinized with almost microscopic power; not, however, so much for the purpose of fastening details in the memory as for the purpose of discovering and fixing in the mind the strong points of the case. Lord Abinger's practice, as he says in his memoirs, was to hunt for and secure the strong points.[50] This is the hunt every great advocate makes, and, although it may lead into by-paths and out-of-the-way places, he never loses sight of the object of his search. It is not of so much importance that many points be discovered as it is that the strong ones be brought out and placed before the jury in a light so great as to exhibit their full force. Æsop's fable of the cat and the fox well illustrates the case of an advocate with many points, while his adversary has only one, but that a capital one.

The advocate who merely commits the evidence to memory can not present the facts with strength or force to a jury. They must be wrought out and crystallized by thought, for an advocate whose mind is choked with undigested materials will perceive but faintly and dimly the strong points of his case, and will present them feebly and obscurely. The facts must be fully and distinctly in his own mind, and go to the jury clearly cut and sharply defined. It is not by fastening the evidence in memory that success is assured, but by thinking and reasoning out the strong points of the case. The case must be investigated for a twofold purpose—for the facts, and for the means of placing them before the triers; but the principle which governs in the investigation is not the same as that which controls the development and presentation of the facts. The work of extracting the facts which give tone and color to the case must not be left for the jury to do, but must be done by the advocate. In doing this work he must of necessity push his way along devious paths leading crookedly through many details; but he must bring order out of confusion and make the path straight and easily found.

The evidence exhibits the facts, but the evidence is the means of proof, not the body of facts.[51] The investigation is to be so made

[50] Memoir of Lord Abinger, 61–62.

[51] Schloss v. Creditors, 31 Cal. 203; Perry v. Dubuque &c. R. Co., 36 Iowa

as to dig out the facts and secure the means of exhibiting them, but not so as to choke the mind with a mass of material. It is one thing to so conduct the investigation of the case as to obtain a knowledge of the facts, and quite another thing to convey that knowledge to the minds of others. The effective advocate presents to the jury, not the crude materials he has collected, but the results which his work has produced from the materials he has gathered in his investigation. The crude materials are worked into new forms and shapes before they are laid before the jury in argument. It may be necessary, and, indeed, almost always is necessary, to give much evidence to the jury, but it should be evidence that has weight and force, for weak evidence, like a weak argument, detracts from the force of the strong. But until the materials are thoroughly examined what is weak and what is strong can not be known, so that, while all the details are not to be presented in argument, they must be brought into a full light by the preliminary investigation. The lives of great advocates, from the time of Cicero to the present, afford abundant proof of the great power that springs from the faculty of investigation industriously exercised. Take, as one instance of many, that of Alexander Hamilton, of whom Fisher Ames says: "It is rare that a man, who owes so much to nature, descends to depend on industry as if nature had done nothing for him. His habits of investigation were very remarkable his mind seemed to cling to his subject until he had exhausted it."[52]

It is not enough to obtain information of the facts; this information must be supplemented by a knowledge of the means of making them evident to the triers of the case. The means of making the facts evident are prescribed by law. Where the evidence can be found, and what its character is, are matters almost as important as a knowledge of the facts themselves; for it would profit little if the means of making the facts evident were not at command, however thorough the knowledge of the facts may be. The

106; 1 Greenl. Ev., § 1; 1 Elliott Ev., §§ 8, 9. Compare also, Gates v. Haw, 150 Ind. 370, 50 N. E. 299; Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N. W. 935, 937; People v. Beckwith, 108 N. Y. 67, 15 N. E. 53.

[52] Works of Fisher Ames, Vol. II, p. 200.

information as to the means of establishing the facts must be something more than the mere inference or judgment of the client. It must be information of the evidence as it actually exists. It may be that material facts can only be proved by written evidence, or it may be that only a particular kind of documentary evidence is competent; or, again, it may be that only a particular class of witnesses will be permitted to testify. Interest may disqualify, capacity may be wanting, or lack of skill may constitute incompetency. Much, therefore, must often be ascertained in order to determine whether the evidence will be received.

One of the most important matters, in many instances, is to secure competent evidence of the identity of persons, domestic animals, documents, inanimate personal property or real property. The reports contain many cases showing the importance of securing competent and satisfactory evidence of the identity of persons engaged as parties or participants in the transaction in question,[53] and that witnesses are often in error in their identification.[54] So, it is often very difficult to identify domestic animals, and descriptions of real property in deeds, wills, and other writings are frequently insufficient to identify it without resort to parol evidence.[55] This entire subject is fully treated in "General Practice."[56]

It is often necessary to ascertain the reputation of the witnesses, not for the purpose of determining their competency, but for the purpose of providing means of attacking or defending that reputation, as the case may require. It may happen that the character

[53] White v. Commonwealth, 80 Ky. 480; Commonwealth v. Cunningham, 104 Mass. 545; Ruloff v. People, 45 N. Y. 213; People v. Williams, 29 Hun (N. Y.) 520. See also, American &c. Co. v. Spellman, 90 Ill. 455; State v. Smith 129 Iowa 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539; 1 Elliott Ev., § 604.

[54] Ram on Facts, 462; Sergeant Ballantine's Experiences, Chapts. XLI, XLII; Legal Puzzles, 183; 1 Southern Law Jour., 392; Wharton & Stille's Med. Juris., §§ 620, 626, 649; The Prisoner at the Bar, 230, 231.

[55] Abbott v. Abbott, 51 Me. 575; Patton v. Goldsborough, 9 Serg. & R. (Pa.) 47; Raymond v. Longworth, 14 How. (U. S.) 76, 14 L. ed. 46; 1 Elliott Ev., §§ 602, 603, 613, 615.

[56] 1 Elliott's Gen. Pr., §§ 37, 42. See also, 2 Moore on Facts, §§ 1221-1234.

of the witness is so bad that, although he may speak the truth, it will require a strong array of circumstances to fortify his testimony, or that other testimony will be required to corroborate it. The business of the principal witnesses should be known, and, in many cases, their associations and surroundings, for this information will be of great importance in selecting a jury, since it is expedient to select jurors who are least likely to be prejudiced against the witnesses. Nor is the investigation to be confined to the witnesses of the client the advocate represents; the information as to the reputation, habits, life and character of the adversary's witnesses should be as thorough as possible. This information will be of assistance, not only in selecting the jury, but also in examining the witnesses on the trial.

An examination of the client is not well conducted unless it reveals his weakness as well as his strength. His peculiarities, when known, can be provided against when they are such as to prejudice him, or their power for good can be augmented when they are such as to bring him favor. His judgment as to the materiality of testimony, oral or written, can not be allowed to supplant that of the advocate. If there are any written instruments, contracts, notes, receipts, letters, or the like, within his reach, they must be secured, and every scrap of them examined by the advocate, and in no event should it be left to the client to determine their materiality. If the consultation with him discloses a propensity to do much talking, he should be not only advised, but commanded to be silent. Oral admissions are often, as we have said, tortured much beyond their meaning, and a talking client will open the way for much prejudicial testimony.

All letters concerning the case should be written or dictated by the advocate. All negotiations, after the advocate has taken charge of the case, it is his duty to conduct, and of this the client should be informed. Better let an obstinate client go than risk an humiliating defeat, and a client who will not heed advice is sure to endanger his cause. An advocate is not bound to sacrifice his own standing for such a client, and the sooner he is rid of him the better. It is the right of the advocate to insist that his advice be

strictly followed, and in the outset he will do well to so inform his client.

Clients stating their own claims are prone to exaggerate them. The longer they think over the matter the larger their claims grow. The prudent advocate, bearing this in mind, will not be influenced to press a claim so greatly magnified as to seem ridiculous. A party who demands an unreasonable thing creates a bad impression at the outset, which is likely to cling to the cause as tightly as the Old Man of the Sea clung to Sinbad the Sailor.

Written statements, whether prepared by the client or the witnesses, are not substitutes for personal examinations. The reason for this is manifest; but, obvious as the reason is, advocates often make costly mistakes in accepting written statements and dispensing with personal examinations of the witnesses.

Information as to the character, business and associates of the client is important for more reasons than one. It is important in the work of selecting the jury. Men do carry their prejudices into the jury box, and are often controlled by them; sometimes they willingly yield to them, and sometimes they are unconsciously controlled by them.[57] In passing through the minds of men warped by prejudice facts are tortured and twisted from their natural effect. Facts can no more pass through a mind filled with preconceived opinions and prejudices than a piece of white paper can pass through a pail of ink without being discolored. Such a mind is not unlike a vessel filled with smoke—all that goes into it is darkened. Jurors belonging to one class are often so bitterly prejudiced against men of another class that they will not award them justice if there is the baldest pretense for evading duty. Indeed, in many instances, prejudice so dominates duty that justice is denied without the semblance of an excuse. Pursuits make men clannish, and, except when envy or rivalry exists, men engaged in like pursuits will stand together as if engaged in a common cause. The books contain many instances where unjust verdicts have resulted from jurors allowing their prejudices in favor of those engaged in like pursuits to control their judgment. A jury of land-

[57] See remarks of Judge Rabb in Proceedings of Indiana Bar Association in 1906, page 203.

lords will be very likely to deal unjustly with a tenant contesting a case with his landlord, and a jury of tenants in a like case would be slow to deal out justice to the landlord, however strong his case. Farmers are always on the side of farmers, and there is usually an impression in their minds in favor of one of their own class, which must be dislodged before the opposite side can secure a fair hearing. A jury of physicians, unless of opposite schools, would be a very dangerous one for the plaintiff in a case of malpractice. Railroad men on juries are almost always favorable to a railroad company, and men who dislike great corporations, or who are jealous of power, or who view with envy corporations that have acquired wealth and influence, are almost always unalterably set against a railroad company.

These hints, we know, are of things so plain that mention seems unnecessary; and what we suggest is, we know, old—old, at least, as the time of Plato's pastry-cook—but, for all that, these hints may serve a useful purpose in arousing attention to plain considerations often forgotten or overlooked. But passing to a somewhat different phase of the subject, we shall find other reasons for acquiring a thorough knowledge of the client. It is not always expedient to select jurors who are acquainted with the client the advocate represents. Some men fare better at the hands of strangers than of acquaintances. A man whose reputation is not of the best is often safer in the hands of strangers than in the hands of neighbors. Nor is it always best to select acquaintances as triers even where there is no infirmity in the client's reputation, for peculiarities of character may create adverse prejudices. But the better the jurors know a thoroughly good man the safer his cause is in their hands.

There are cases where steps must be taken without an instant's delay, and in such cases the advocate must act upon the information given by his client; but where there is time for consultation with the witnesses it should be held before the action or suit is instituted. This is expedient not only for the reason that it gives the advocate a firmer grasp of his case, but for the additional reason that it often enables him to procure an unprejudiced history of the facts. Mr. Chitty says: "It will, moreover, frequently occur

that if a minute inquiry into the facts and evidence be made in the first instance, before the defendant has even heard of any intended litigation, the truth will be better elicited than if the investigation were delayed until after the defendant had cautioned neighbors and witnesses from making any communications that might be adverse to his interests."[58] But there is still another reason for promptly examining the witnesses. Time dulls the perceptive faculties and quiets the interest and ardor that the mind feels in an occurrence freshly brought before it. Men are less affected by a thing long passed than by one of recent date. If an advocate delays in investigating a case he will do his work much less efficiently than he would with all his faculties aroused by a matter fresh in his mind. It is the experience of most advocates that on the second trial of a cause, where no new facts are developed, the mind acts with much less vigor and power than on the first trial. This is so because the facts do not strike with the same force they do when the mind is aroused by a thing heard as of recent occurrence, and as affecting a matter upon which immediate action is to be taken. What is true of the advocate is true, although in a less degree of force, of a witness, for the lapse of time weakens his memory and dulls his faculties. It is, therefore, prudent to have the preliminary examination take place with the least possible delay.

If the facts are once thoroughly fixed in the mind of the advocate the excitement of the actual contest will bring them out with undiminished strength. If the impression is made when the mind is warmed by the new matter which invokes and arouses its powers, the impression is not likely to fade, but if no impression is made at the outset when the mind is in a condition to receive and retain all that is presented, it is not probable that a strong one can be made at any subsequent period. Mr. Chitty not only recommends promptness in making a preliminary examination of the witnesses, but he also recommends that the questions and answers of the principal ones be stated in writing.[59] If there be reason to

[58] 3 Chitty Gen. Pr., 118. See also, Archer's Law Office & Ct. Proc., 12, 13, § 10.

[59] 3 General Pr., 120.

fear that the witnesses will change their statements, either from defect of memory or through the influence of corrupt practices, this course is expedient, but the advocate should not trust to the written statement. It is his duty to fasten the facts in his mind, for it is only by this course that he can give them their just weight. The facts he must know, not merely remember. In dealing with the facts the advocate goes far beyond the witnesses, for he exercises other faculties than that of memory. He must weigh, arrange and mould the facts into a case, framed and constructed in his mind. He must have a theory into which he can place his facts. This he can do only by making the facts a part of his thought-knowledge.

In his investigation of the facts it is the duty of the advocate to assume that his client has no knowledge of the law. This assumption must control the interview with the client, and no assistance can be expected from him upon what he will regard as mere immaterial and formal matters. The investigation must be so conducted as to bring these matters to the attention of the client. If they are forgotten by the advocate they will be entirely lost sight of. There are many things indispensably essential to success, which to laymen seem unimportant, and these things must be brought to the mind of the client by his counsel. In many instances it is essential that a demand should precede the action; in others, that a tender should be made; in others, that a notice should be served. Of these and like matters the counsel must inform his client, and give him the necessary instructions.

Although the advocate must assume that the client has no knowledge of the law, and should not seek his opinions on law questions, yet it is always wise, if the client be a person of intelligence, to secure his theory of the justice of his case. It often happens that the client will form strong opinions of his rights, and place them in a homely, yet forcible, way on a foundation of natural justice. The judgment of the client may thus often aid in presenting the case to a jury, for jurors are more strongly influenced by what they conceive to be natural justice than by that which they regard as artificial law made by lawyers. The biographies of lawyers contain many instances where the greatest advo-

cates have won their causes by adopting the statements of their clients. Advocates do often lose force by dwelling upon rules of law instead of appealing to r sense of justice innate in every man, and so, too, they often lose force by employing law terms when more familiar ones would find a deeper lodgment in the minds of jurors. The help they most need may sometimes be supplied by the client's theory of the justice and right of his case.[60]

[60] See Collins' Cicero, 85. So, Mr. Wellman says: "The layman's common-sense view is often better than any legal opinion on the subject."

CHAPTER II.

ASCERTAINING AND PREPARING THE LAW OF THE CASE.

"Whereas, if many of our young practitioners had, like Pythagoras his scholars, kept silence for some years and consulted with their books, they would be the better enabled to give the reason of the law."

—*Edward Bulstrode.*

"What front must that advocate have who dares to appear in causes of such a nature without any knowledge of that law!"—*Cicero.*

"For my part, since it was your desire, I thought that the fountains ought to be shown you from which you might draw, and the roads which you might pursue, not so that I should become your guide (which would be an endless and unnecessary labor), but so that I might point you out the way, and, as the practice is, might hold out my finger toward the spring."—*Cicero.*

"Remember that no man can be a great advocate who is no lawyer."

—*Erskine.*

At the outset, the searcher for the law of the case[1] must assume that the case for which he is to find the law belongs to a particular class, and is governed by a settled principle. Before going to the books the investigator must have a definite conception in his own mind of what he goes there to find. This conception, if

[1] Of course this phrase is not here used in its limited technical sense as meaning the law as declared by the court on appeal which is conclusive throughout subsequent stages of the same case. As to the extent and limitations of the "law of the case rule," see Alerding v. Allison, 170 Ind. 252, 83 N. E. 1006; Klauber v. San Diego St. Car Co., 98 Cal. 105, 107, 32 Pac. 876; Wixson v. Devine, 80 Cal. 385, 388, 22 Pac. 224; Elliott's App. Proc., § 578, and cases there cited. Compare Henry v. Atchison &c. R. Co. (Kan.), 109 Pac. 1005, 28 L. R. A. (N. S.) 1088. See also, a treatment of this subject in the article on "Stare Decesis," in 26 Am. & Eng. Ency. of Law (2d ed.) 158, 184, *et seq.*

clearly formed, will be a provisional hypothesis, and an hypothesis, even though a provisional one, will give direction and method to the investigation. Without a definite hypothesis the investigation will be an aimless one, lacking both direction and method. As well go into a forest to find a tree without knowing what tree is wanted as to attempt to search the books without having some definite idea of what is to be found.[2] The wildest conjecture as to what is the law is better than no conjecture. A provisional hypothesis, however unsound, is infinitely better than an aimless and purposeless search. Investigation, it is true, may prove the hypothesis to be utterly unsupported, but, if it does, the exposure of the error will serve to reveal the truth. An error clearly observed nearly always points an investigator to the true direction.[3]

The provisional hypothesis is a mere working conjecture, not a fixed theory. The investigation is not conducted for the simple purpose of proving the soundness of the hypothesis, but for the purpose of testing it. A case is submitted for investigation, and the advocate assumes that it belongs to a designated class, and falls under a particular rule, and on this assumption begins his examination, not for the purpose of establishing the assumption, but for the purpose of ascertaining whether it can be made good. His assumption gives direction to his work, for it places an object before him toward which his steps must be taken. Without such an object before him there could be neither line to follow nor method to control his work. There is, however, a danger which

[2] "For, as Plato says, a searcher must have some knowledge of the thing he searches after, otherwise he will not know when he has found it."—*Bacon.*

"All the greatest discoveries of the human intellect in the various sciences," says Mazzini, "have originated in hypothesis, afterward verified by study."

[3] Littleton, in closing his great work on Tenures, says: "Notwithstanding albeit that certain things which are moved and specified in the said books are not altogether law, yet such things shall make thee more apt and able to understand and apprehend the arguments and reasons of the law, etc. For by the arguments and reasons in the law a man more sooner shall come to the certainty and knowledge of the law."

is to be avoided. It is the nature of men to be fond of their own creations, and to cling to them with unreasoning tenacity, and this influence sometimes leads advocates to sacrifice a cause to a favorite hypothesis.

In the search for the law of the case the advocate proceeds much as a philosopher who seeks to discover scientific truths. His provisional hypothesis is a means to an end. It is not a position to be defended at all hazards, but one to be held or surrendered as investigation may result in declaring it to be tenable or untenable. In seeking the law of the case the advocate exercises functions similar to those of the judge. But his process differs from that of the judge and the philosopher, for he seeks a rule that, applied to the facts, will secure a judgment for his client. This confines his search and colors his reasonings. But in this work he is not a partisan, or at all events he should not be a partisan, for he seeks materials that may be used in the construction of a theory which will bring him success, and cool, unimpassioned investigation is necessary to keep out unsound and unsuitable materials. After the materials have been gathered and woven into the theory of the case, then he becomes a partisan, for no man who earnestly takes up another's cause can avoid becoming a partisan. All doubt and hesitation are then at an end, and the position upon which the case is planted will be maintained with all the vigor and strength that is at command. While the investigation is in progress the coolness and impartiality of a judge or philosopher give strength and certainty; but when that work is finished the weapons of the advocate are drawn, and the functions of philosopher and judge are displaced by those of the combatant. The advocate is no longer neutral; thenceforward his work is not to find some position, but to maintain the one he has found and occupied.

The law for which one seeks with a real case before him is the law of that particular case. It will not avail him to know many rules if he does not know the rule which governs the case he has in hand. An advocate with a case before him has actual work to do, not merely principles or rules to commit to memory. This work is not that of the student learning the elementary principles of jurisprudence. An architect may be learned in his profession,

but if he does not know what kind of a bridge is required at a particular place on a particular stream, he can not put the bridge there that is needed. No more can an advocate, however much he may know of the law, successfully conduct the trial of a particular case unless he knows the law of that case. Books cannot tell him what the law of that case is, although with the aid of books, or of previously acquired knowledge, he may reason it out; but reason he must, and the more profound his learning the more certain he will be to reach a right conclusion. His previous knowledge must, at least, be sufficient to enable him to intelligently construct a provisional hypothesis; for if he is not able to do this he will be unable to lay out a line of investigation, and much less will he be able to follow it through the difficult paths it traverses.

The man who has not fitted himself to conduct causes in judicial tribunals by a long course of study of the principles of jurisprudence is not an advocate; "for," to borrow something of the language and more of the thought of Cicero, "to flutter about the forum, to loiter in courts of justice and at the tribunals of the prætors, to undertake private suits in matters of the greatest concern, in which the question is often not about fact but about equity and law, to swagger in causes heard before the centumviri when a man is utterly ignorant 'of the principles of jurisprudence,' is a proof of extraordinary impudence."[4]

In giving to a man the title of advocate it is implied that he is learned in the law. It is assumed, therefore, that an advocate has a knowledge of the rudimentary principles of the law and of the rules of pleading, practice, and evidence. But one who assumes that his preparatory studies have fully equipped him for the contests of the forum is sadly deceived. His preparatory studies have, perhaps, taught him how to equip himself for the real contest, but they have done no more. Jurisprudence is "the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns."[5] Cases as diverse as human concerns are the subjects of study and investigation in advo-

[4] Oratory and Orators, Bk. I, xxxviii.
[5] Burke, "Reflections on the Revolution in France."

cacy, and to these various and often diverse cases, the principles of what Burke calls original justice must be applied. The science of jurisprudence is, as Judge Story says, "of such vast extent and intricacy, of such severe logic and nice dependencies, that it has always tasked the highest minds to reach even its ordinary boundaries."[6]

The most learned advocate has many a weary hunt for the law of his case. His learning guides him in his search, but it does not always yield him the support he needs. It points him to the spring and shows him the road to the fountain, but it seldom does more. The search in which his learning is his guide, leads him through the decision of the courts and the works of the great lawyers. These are the sources from which the law of the case must be obtained. If a text-book be the work of a philosophic lawyer, it will discuss the fundamental principles of the law; if the decision be that of an able judge, it will show the application of those principles to particular cases. It is, therefore, to be expected that the clearest knowledge of the principles will be conveyed by the text-writers, while the clearest conception of their application will be conveyed by the judicial judgment. Both the principles and their application ought thus to be sought and found.

Jurisprudence is a practical science. It is a science of principles. Cases illustrate principles, but they do not create them.[7] The law is not a mere collection of cases strung together upon a slender thread of resemblances. The learning of the advocate available for practical use is of principles and their application. Professor Washburne says: "The learning of the lawyer does not consist so much of principles as of the relation which these hold to each other in their general application."[8] There is much of truth in this statement, yet there is enough of error to make it misleading if taken without qualification. It is impossible to understand the relation of principles to one another without a thorough knowledge of the principles themselves. This is the basis

[6] Story's Life and Letters, Vol. II, 145.

[7] Paul v. Davis, 100 Ind. 422. See also, Sohnlein v. Sohnlein (Wis.), 131 N. W. 739, 742, *et seq.*

[8] Study and Practice of Law, 64.

of scientific knowledge, without which there will be little hope of successfully making a way through the thorny and intricate labyrinths of jurisprudence.

The text-books which are to be regarded as the sources of knowledge are those which discuss principles, and not those which collect cases without discussing them. Many of our modern law-books are not scientific treatises, and can not be accepted as authority, for they are little else than digests. They may be valuable as indexes, but they are not the books that should be studied. It is not, however, always safe to implicitly rely on text-books of the highest character, for errors in them have often been exposed by the courts.[9] On the other hand, text-writers have detected and corrected the errors of the courts.[10] A knowledge of principles, without capacity to apply them, is of no practical value. Indeed, a knowledge of principles without a knowledge of their practical application is almost as likely to result in harm as good. Mr. Warren says that "It requires the nicest discrimination to ascertain whether a particular case falls within the general rule, or is governed by some of its endless limitations and exceptions, and this discrimination must be the result of calm, leisurely and extensive study and practical experience. General principles are edge tools in the hands of the legal tyro, and he must take care how he handles them."[11] The reported cases bear out Mr. Warren's statement that "general principles are edge tools," to be carefully handled; but, for all that, the workman must have these

[9] Shurtliff v. Millard, 12 R. I. 372, 34 Am. 640; Robinson v. Weeks, 56 Me. 102; Union Bank v. Maruter, 57 L. J. (N. S.) 877; House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. 189; Ram's Legal Judgments, Chap. XII.

"Take heed, reader," says Coke, "of all abridgements, for the chief use of them is as of tables to find the books at large, but I exhort every student to rely on the books themselves." 5 Rep. 25. See also preface to 4 Rep. X. And it is neither safe nor good practice, ordinarily at least, to cite such abridgements or digests to the courts.

Some of the English judges have censured, not justly, as we think, the practice of citing the works of living writers. 37 Albany L. J., 206.

[10] Ram Legal Judgments, 169.

[11] Warren's Law Studies, 325.

tools. His advice to study calmly and leisurely is wise as applied to the mere student, but it is not safe for the lawyer who is preparing a case for trial to follow it, for, when the work of preparation begins, the mind must be aroused to its utmost. The investigator should not work leisurely or calmly, but determinedly, and with an almost fanatical enthusiasm. His mind must be concentrated upon the work. He must, as De Quincey says, "have an eye single to the assault." This earnestness and enthusiasm, it is obvious, is not compatible with a leisurely and calm deliberation. All advocates who have had long experience know that when the work of determining the law of the case actually begins there is a warmth and a glow that arouses the faculties and excites them to energetic and effective work. There must be a purpose and a determination in the search strong enough to arouse the mind to active effort, or it is very likely to be a fruitless quest.

In determining the weight and applicability of a decided case the first work is to ascertain what points were really decided, for much that is found in the opinions of the judges is mere argument and illustration. These arguments and illustrations merit study, for, while they are not declarations of the law, yet they contain statements of analogous legal principles, and often refer to authorities that afford very valuable assistance in the investigation. When the reasoning of the case is against the view of the investigator he should trim the case down to the exact points presented and decided, and then test the reasoning by comparison with principle. It is never safe, it may be noted in passing, to rely upon the reporter's head-notes of a case. They are not always correct, and even when correct they do not convey that close and distinct perception of the case which is indispensably essential to a full comprehension of its force. Sometimes the *dicta* contained in the opinion will be of weight because of the learning and ability of the judge by whom the opinion was written; but even in such a case they are not part of the decision of the court.[12]

[12] Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 48. See also, Johnson v. Bailey, 17 Colo. 59, 69, 28 Pac. 81; Hart v. Stribling, 25 Fla. 435, 6 So. 455; State v. Brookhart, 113 Iowa 250, 84 N. W. 1064; Cross v. Burke, 146 U. S. 82, 86, 36 L. ed. 896, 13 Sup. Ct. 22; King v. McLean

What is said by the judge in the course of the opinon must be confined to the facts presented by the case in which the opinion was delivered,[12] and it is always important to carefully ascertain the points of agreement, and discriminate the points of difference between the reported case and the one under examination. The greater the number of decisions that sustain a proposition the more certain the conclusion that it was correctly decided, for these are instances of the concurrent judgments of men learned in the law; but it is not always safe to assume as true a proposition sustained by a long line of cases, for close investigation may lead, as has not infrequently happened, to the discovery that the entire line of cases rests upon a single ill-considered and wrongly decided case, and that, consequently, all the cases must be overthrown. Where the cases, like the Swiss troops, fight on both sides, then the investigator must select such cases as seem founded on solid principles, and lead to good results. It is, however, often very difficult to tell which of two lines of conflicting cases should be followed, and the only safe course is to find some general principle that will serve as a standard by which to test the cases opposed to the views of the investigator. This it is sometimes difficult to do, for, it is said, "the comparative weight or

Asylum, 64 Fed. 331, 340, 12 C. C. A. 145, 26 L .R. A. 784. But compare: Michael v. Morey, 26 Md. 39, 90 Am. Dec. 106. But where the record presents several points and they are all decided it does not follow that what is decided as to any one of them should be treated as *dicta*. Hawes v. Contra Costa Water Co., 5 Sawy. (U. S.) 287; Bates v. Taylor, 87 Tenn. 19, 325, 11 S. W. 266. And a subordinate proposition necessary to the conclusion and decision reached by the court may well be treated as part of the decision rather than dictum. School Dist. No. 280 v. Stoker, 42 N. J. L. 115. See also, Kirby v. Boyette, 118 N. Car. 244, 24 S. E. 18; Allen v. Flood (1898), A. C. 1.

[12] Cohens v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; King v. McLean Asylum, 64 Fed. 331, 340, 12 C. C. A. 145, 26 L. R. A. 784 *et seq;* People v. Winkler, 9 Cal. 236; Wadsworth v. Union Pac. R. Co., 18 Colo. 600, 33 Pac. 515, 36 Am. St. 309. See also, Lake Shore &c. R. Co. v. Wilson, 11 Ind. App. 488, 38 N. E. 343; Quinn v. Leathem (1901), A. C. 495. Note in 34 L. R. A. 321.

credit of authorities where they conflict is a matter of professional science which is not regulated by any determinate rule."[14]

A decision must, as we have said, be considered with reference to the facts out of which the questions of law arose. It was said by Lord Manners that "It is always unsatisfactory to abstract the reasoning of the court from the facts to which that reasoning is meant to apply. It has a tendency to misrepresent one judge and mislead another."[15] The tendency of the reasoning of the court, considered apart from the facts, to mislead, is one reason why it is unsafe to rely upon the text-books, for they often assert as a rule what the court states as an argument. The danger of being misled is much greater to the advocate engaged in the investigation or argument of a cause than to a judge who hears both sides of the question discussed. The only security for the advocate is in a careful analysis of the facts and a close comparison of the legal doctrines declared with the fundamental principles of law. It is not an unfrequent occurrence for an advocate who has not given the cases relied upon by him a thoughtful study to be humiliated by having them turned against him. The reports contain many instances where, even on appeal, cases have been cited which have furnished weapons to the enemy. It often happens that cases are decided on particular circumstances, and such decisions can only be relied on where the circumstances in the reported case and in the one under investigation are the same. It is seldom prudent to build on cases of this character, for they are seldom well decided. They are, indeed, more frequently so narrow as not to be entitled to any rank, even the lowest, as authoritative precedents.

Various elements enter into a consideration of the question of the weight to be assigned a judicial decision. A well reasoned and carefully considered case is entitled to more weight[16] than

[14] See Wambaugh's Study of Cases as to rules for weighing and criticizing decisions.

[15] Revell v. Hussey, 2 Ball & Beatty 286. See authorities cited in last preceding note; also Linstroth Wagon Co. v. Ballew, 149 Fed. 960, 79 C. C. A. 470, 8 L. R. A. (N. S.) 1204, 1209; Friedman v. Suttle, 10 Ariz. 57, 85 Pac. 726, 9 L. R. A. (N. S.) 933.

[16] And the weight of a decision may also depend to some extent upon

one not well supported by reason and not thoroughly considered. Mr. Bishop seems to take ground against any reasoning by the judges in their opinions, but we can not concur in his view. The reasoning, if sound and strong, brings strength and respect; if weak and inconclusive, leads to the detection of fallacies and errors, and, ultimately, to the final overthrow of the case. The point of view which Mr. Bishop occupies is that of a text-writer, and his judgment seems somewhat warped by his adherence to his peculiar notions of the authority of text-books. An opinion concurred in by all the judges composing the court is generally, but not always, of more weight than one delivered by a divided court. The dissenting opinion of a great judge will sometimes command higher respect than that of his associates, but the decision of the majority is alone authoritative.[17]

Judicial decisions are not, in a strict sense, authority, except in the jurisdiction where they are pronounced. The text-writers, and the courts generally, speak of these decisions as authority, but beyond the court's jurisdiction they have force only as arguments. They are not authority in the sense of having the force of absolute law, even in the jurisdiction where the court pronouncing them is the highest judicial tribunal.[18] They may be overruled, and they will be overruled if clearly opposed to principle,[19] although courts are always reluctant to change their decisions.

whether the point ruled on was made and discussed before the court. People v. Brooklyn, 9 Barb. (N. Y.) 544; Molony v. Dows, 8 Abb. Pr. (N. Y.) 316; Larson v. First Nat. Bank, 66 Neb. 595, 92 N. W. 729. But see Michael v. Morey, 26 Md. 239, 90 Am. Dec. 106. It is said that a *per curiam* opinion is one where the court are all of one mind and the case is so clear as to need no extended discussion, and that it has the same weight as any other opinion. Clarke v. Western Assurance Co., 146 Pa. St. 561, 23 Atl. 248, 28 Am. St. 821.

[17] For a discussion of this interesting subject read Chapters XII to XIX, Ram on Legal Judgments; Bishop's First Book of the Law, Book IV, Chapter XXIII; Heard's Criminal Pleading, Chapter I.

[18] They are, in a sense, only evidence of what the law is. Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 871; New Orleans Water Works Co. v. Louisiana Sugar &c. Co., 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. 741.

[19] Paul v. Davis, 100 Ind. 422. See also, Ellison v. Georgia R. &c. Co.,

Principles for the government of particular cases are in many instances obtained by a process of analogical reasoning. The resemblance between the cases must be both in the facts and in the law. "The argument from analogy is forcible only when the resemblance is close; if there are marked points of difference between the conclusion deduced and the examples taken as leading by analogy to it, the argument fails."[20] In logical language, the marks of the cases taken as examples and the marks of the cases for which a governing principle is sought must be the same in essence. It is not, however, always necessary that the forms of the marks be the same, but in essence they should be as nearly identical as possible. The closer the resemblance the stronger the argument. Forcible as the argument from analogy often is, yet it is nevertheless often a source of error, not only in open discussion, but also in the investigation made in private. "There is no greater fallacy," says a learned judge, "than that of carrying an analogy too far, and supposing that, because there is a resemblance between two things in one point, they therefore correspond in every respect."[21] A general likeness may exist between many cases, and yet upon one point the difference may be so great as to completely destroy the analogy. The analogue upon which the reasoner bases his mental process requires examination from every side, so that its points, or marks, may take a prominent place in the mind, and not have a place as an indistinct image perceived only in shadowy outlines. The mental image of the analogue, and that of the case for which it is supposed to supply a rule, should take their places in the mind side by side so clearly

87 Ga. 691, 13 S. E. 809; McAdams v. Bailey, 169 Ind. 518, 533, 82 N. E. 1057; Henry v. Atchison &c. R. Co. (Kan.). 109 Pac. 1005, 28 L. R. A. (N. S.) 1088; Rumsey v. New York &c. R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. 600. But the doctrine of *stare decisis*, as where prior decisions have become and been acted upon as a rule of property, may induce the court to stand by decisions that are erroneous. *In re* Lashmar (1891), 1 Ch. 258; The Madrid, 40 Fed. 677; Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358; Long v. Long, 79 Mo. 644, 26 Am. & Eng. Ency. of Law (2d ed.) 158; note in 34 L. R. A. 321; notes in 27 Am. Dec. 628 and 73 Am. St. 98.

[20] Goodwin v. State, 96 Ind. 550, 573. See also West v. Kansas Nat. Gas Co. (U. S.), 31 Sup. Ct. 564, 570.

[21] Lord Chancellor Cresswell in Keats v. Keats, 32 Law Times 321.

that the comparison which the mind makes may bring fully into light every mark or point. No other course will enable the solitary reasoner to escape error, nor will any other course put it in his power to convey his judgment to another mind with clearness and strength.

The shortest and the safest method of searching for the doctrine of the text-writers upon any particular subject is to look through the table of cases and find where a leading case is discussed. It is not always easy to determine under what head a particular principle which it is desired to examine should be indexed, and it is often difficult, and sometimes impossible, to discover what one is in search of in the index. The work of hunting through an index is frequently a perplexing and unsatisfactory one; if, however, the title of a leading case is known, it is short and easy work to find the discussion of the doctrine which it declares. But there is another important reason for acquiring and retaining the names of cases, and that is, it enables the investigator to run through the citation of cases in the reports, digests or tables, and ascertain whether the case has been denied, distinguished, criticised, or approved. A case that has not been firmly rooted in the law should not be relied on without examining the table of cases cited, to ascertain whether it has or has not been subsequently approved, denied, or distinguished. By reading the comments of the text-writers and judges upon a decided case a clear and distinct perception of its force is obtained, and a ready and forcible application of its doctrines can be made. The light which discussion casts upon a decided case often clears up obscurities, and illumines dark places. So, too, the examination of subsequent discussions often furnishes important hints as to the proper limitations of the general doctrine, and furnishes, also, suggestions as to the change which a difference in the facts would produce. It is, therefore, prudent to carefully follow such a case in its course through the text-books and reports. The tables of cases, or the books containing citations of cases, will show whether the case has been approved, limited, distinguished, or overruled, and a study of the comments upon it will bring all its points strongly and clearly into view. The doctrines of many

cases have been extended because wise and salutary; the doctrines of others limited because not meriting extension; cases have been discriminated because, while apparently alike, in reality they were different; and others have been overruled because they were wrong in principle. The reasoning of the courts in all these instances is valuable, because it lights up many dark places, and brings into view obscure points.

The immense number of reported cases has not, as some suppose, diminished the work of the lawyer or rendered it less important for him to think for himself. On the contrary, the increase in the number of decisions has made it all the more important that he should work out all legal propositions in his own mind. It can not with safety be assumed that any case, or the doctrine of any text-writer, can be taken as a precedent. Among so many thousand cases there must be collision and conflict, and from this conflict new and juster views emerge. The wealth of argument and illustration found in the decisions of the courts is very great, and in cases of conflict it often requires a long continued study and keen mental vision to decide which "hath the better reason." It is by no means every case or every statement of a text-writer that can be elevated to the dignity of a precedent, and the lawyer must determine for himself to what rank the decision of the court or the doctrine of the writer shall be assigned.

It is said that the great number of decisions "tends to reduce the value of any one decision as a fixed element in jurisprudence," and there is much of truth, but yet something of error, in the observation. It is true that the great number of decisions brings into the field of legal contemplation new arguments and elements; but while these may weaken the value of cases not founded on solid principle, they make more prominent those that are, and add to their strength. Yet the increase in the number of decisions makes it more difficult to determine what shall be considered precedents, and casts the lawyer upon his own mental resources.[22] There is much truth in the observations of a recent

[22] Professor Münsterberg says that the use and effect of precedents consisting of previous decisions gives to lawyers in America an importance

writer who says: "There never was a time when an ignorant and ill-read lawyer was so hard put to it to find on any controvertible point a safe authority on which he could safely rest. But on the other hand it has never been so easy for an intelligent and well-read lawyer to master any controvertible question and prepare to maintain himself with sound reasoning and acute and proper distinctions. The force of the lawyer, which used to rest to a considerable extent on oratory with the jury and a book with the judge, now rests rather on hard facts with the jury and close logic with the judge. This, much as those accustomed to old processes may regret it, and painful as may be the effort of some to adapt themselves to it, is a wholesome change. It enhances the value of the mental force of counsel, gives more influence to his actual knowledge of the law as distinguished from his memory of what is in the books, and compels competition in reasoning, which thus becomes the life of the bar."[23] It is, perhaps, true, as the writer asserts, that the increase in the number of decisions has rendered the possession and use of mental force more necessary; but the lives of the successful advocates prove that they have always relied less on cases than on principles deduced by their own thoughts from books and cases. The chief object of the study of cases has, with really strong men, ever been to obtain a knowledge of the principles of jurisprudence, and to put it in form for use.[24]

Austin well says: "If our experience and observation of particulars were not generalized, our experience and observation of particulars would seldom avail us in practice. To review on the spur of the occasion a host of particulars, and to obtain from those particulars a conclusion applicable to the case, were a process too slow and uncertain to meet the exigencies of our lives. The inferences suggested to our minds by repeated observation and experience are, therefore, drawn into principles or compressed into maxims. These we carry about us ready for

and a sphere of action much greater than in Germany and other European countries. "The Americans," 104.

[23] 22 Central Law Journal 264.

[24] See 39 Albany Law Journal 120.

use, and apply to individual cases promptly or without hesitation, without reverting to the process by which they were obtained, or without recalling or arraying before our minds the numerous and intricate considerations of which they are handy abridgments."[25]

Lord Abinger, an acute observer, says: "I may observe, what a long course of experience has taught me, that the lawyers least to be depended upon are those who are in constant pursuit of cases in point to govern their judgment, and who, therefore, seldom have sufficient knowledge of principles to judge for themselves."[26] A man who depends upon his memory of cases cannot successfully make his way through a contest where the real test of superiority is not so much what a man has in memory as what he can do with what he has. A mechanic may have in his shop a great number of the best tools in the world, but if he has not the skill to use them they are of little benefit to him; and so with the lawyer. He may have in memory many cases, but if he has not the skill to use them they are of no benefit to him.

There are very few general rules to which there are no exceptions, and the exceptions are sometimes as important as the general rules themselves.[27] Close analysis and keen discrimination are required to discover under what principle a case rightly falls. Whether a case falls under a general rule or under some exception to the rule cannot always be determined by a mere reference to books, but the mental problem is one that must be worked out in the mind of the lawyer. He who expects to succeed without thinking for himself is sure to fail. Legal knowledge that will avail in the actual contests of the forum must be something more than rules committed to memory and precedents conveniently arranged for reference, for real legal knowledge is the product of the thinker's own mind. Rules learned from text-books and extracted from decisions supply the materials for thought, but they do not in themselves constitute true knowledge. Locke wisely

[25] 1 Austin's Jurisprudence 118.

[26] Memoir of Lord Abinger, 45.

[27] "There is no rule but what may fail." Plowden's Com., 162.

says: "Reading furnishes the mind only with materials of knowledge, it is thinking makes what we read ours. We are of the ruminating kind, and it is not enough that we cram ourselves with a great load of collections; unless we chew them over again, they will not give us strength and nourishment."[28] The knowledge of the lawyer will be of little use to him unless it can be made available at command, for he must use it, not in the quiet of the study, but in the bustle and excitement of the forum. However richly his memory may be stored with rules and precedents, he will be poor indeed if his resources cannot be called into use at a moment's warning. No profession requires a wider knowledge than that of the advocate, and there is none which requires a more decisive and prompt use of knowledge laid up in the mind. With him knowledge is "to be regarded, not as a pure reception and reflection, but as an inner activity."[29] Clear and distinct ideas of the principles should be secured and arranged under proper names, for names enable us to keep what we acquire as to reach it at call. As Locks says: "The sure and only way to get true knowledge is to form in our minds clear, settled notions of things, with names annexed to those determined ideas."[30]

No one can be a great lawyer unless he possesses keen discrimination. Where the power of discrimination is wanting, a blurred and indistinct impression is produced upon the mind. Such a mental image is much like that taken by a blundering photographer; it is little else than a mere blot, having neither features nor expression. "There is nothing," says a philosophic writer, "that is more characteristic of the higher intellect as contrasted with the lower than its greater power of discriminating, *i. e.*, of seeing points of difference. It is differentiation that is always the law of progress. Knowledge begins as a vague blur, which gradually becomes distinct. Everywhere the specialist's eye sees finer shades of difference than are visible to the public, as the shepherd knows his sheep. It is incapacity for seeing difference that lies at the root of all crude, ill-considered generalization,

[28] Conduct of the Understanding, 63.
[29] Fundamental Concepts, Prof. Eucken, 16.
[30] Conduct of the Understanding, 57.

and therefore at the root of the mental 'narrowness' (as it is usually called) which is ever ready to accept a principle unduly simple and wide in its asserted sweep, and therefore unduly rigid in its actual application."[31] Mr. Bain thus expresses the same general thought: "Our knowledge of a fact is the discrimination of it from differing facts, and the agreement or identification of it with agreeing facts."[32] It is, in truth, impossible to secure a clear and distinct idea of a physical thing, unless by a process of discrimination we separate it from things that resemble it; thus, it is very difficult to obtain an accurate mental image of a face seen in a great crowd, and it can only be done by carefully discriminating the difference between the face sought to be impressed upon the mind and the other faces in the throng. It is much more difficult to separate resembling principles than to separate resembling physical things, for in the case of physical things we have assistance from the organs of sensation, but in the case of abstract principles it is purely mental work. One who looks into the table of cases in any of our digests will be struck with the number of "cases distinguished." In many instances these cases supply examples of keen discrimination and close analysis, although it must be owned that in many other instances the attempt to "distinguish" is a mere pretext to avoid overruling in direct terms a decision which is felt to be erroneous, but which a mistaken notion of consistency deters the court from boldly overthrowing.

The contention falls more frequently upon the question whether the general rule invoked applies to the particular case than upon the question as to the existence of the rule itself.[33] Few expressions are more often heard in the court-room than, "I admit the law, but deny its applicability to the case in hand." There is, as

[31] Fallacies, Alfred Sidgwick, 256.

[32] Logic, 4. See also, Coleridge's Works (Shedd's ed.), Vol. 6, page 142.

[33] See, for instance, Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 363; Frank v. Traylor, 130 Ind. 145, 29 N. E. 486, 16 L. R. A. 115, 119; Anderson v. Anderson, 129 Ind. 573, 29 N. E. 35, 28 Am. St. 211, 212; Irvine v. Leyh, 102 Mo. 200, 209, 14 S. W. 715, 16 S. W. 10.

we have already said, much less difficulty in acquiring a knowledge of general rules than in giving them just practical application.[84] No matter how well stored the advocate's mind may be with principles, he will not attain great eminence nor win success unless he can discriminate differences and agreements, and accurately decide whether the particular case falls within the general principle upon which he plants his case, or within that invoked against him. The law of contracts, for instance, is quite well settled and understood, yet there is constant strife as to the practical application to be made of that law. So, too, the general principles of the law of wills are settled, yet controversies concerning their application are endless. An advocate is not well equipped who knows general rules but has not been trained to apply them. One may have the bow of Ulysses, but it will not be a formidable weapon unless he can bend it. New cases constantly arise which no settled rule of law will precisely fit. One who should expect a single rule of law to fit all cases of the same general nature would be as unwise as a tailor who should attempt to make all suits cut in a particular pattern fit all men of a particular race or class. The reason why new cases arise is cleverly given by DeQuincey in his essay on Casuistry. It is true, as he says, "that new cases are forever arising to raise new doubts whether they do or do not fall under the rule of law."

Writers of leading articles in the law periodicals are, for the time, at least, and in a limited sense, specialists discussing particular subjects with a well-defined object in view.[85] If they do their duty well, as in general they do, they will discuss the particular topic better than an author of even more ability writing upon a general subject. Their mental power is concentrated, and they see more clearly the lights and shades, the agreements and the differences, than one who takes a broad view of even one branch of jurisprudence. For this reason a greater benefit from the study of these articles may sometimes be derived than can

[84] Mills' Logic, 208.

[85] "An Index to Legal Periodical Literature" and several other books of like character have been published, and will be found in most large state or other public law libraries.

usually be gained from the study of the text-books. To be sure, these articles can neither be well understood nor properly used without a knowledge of the elementary principles; but when these principles are mastered, the articles of which we are speaking light up many dark places, and reveal the true road. What has been said cannot, of course, apply in its full force to articles which string together upon a slight thread of thought the conclusions of text-writers and judges; but, even from leading articles, as they are called, of this class, assistance may often be obtained. The criticisms of cases found in our law periodicals, although not always just, are sources from which valuable knowledge may be acquired. When, as often happens, an error is pointed out, it is done so clearly and so strongly that the converse of the rule adopted by the judge is so distinctly perceived that there is little room for mistake. On the other hand, when it happens, as very often it does, that the critic is wrong, the right appears in all the stronger light, so that no great mental vigor is required to attain the true knowledge. But not alone for these reasons should the advocate look to the magazines, for he will often find in them suggestions that will lead to a train of thought which will clear away doubt and perplexity, and light up more than one dark corner. We are not now, it may not be amiss to remark, referring to the mere reading of the magazines as they come from the press, for that, we suppose, will be done for the purpose of keeping in line with the current legal literature and decisions, but we are speaking of occasions when the advocate, with his mind aroused to actual work, is searching for the law of his case. More lawyers than one, veterans in experience and masters in rank, have received valuable assistance from the law journals.

Where the rule of law which governs the case is found in the statute, then, of course, reference must be made to the statute, and this is one of the first places in which counsel should look if his case is one that is at all likely to be governed or influenced by any statutory provision; but even when the rule is a statutory one, the advocate's duty is not done by a mere reading of the statute. The work of construing a statute is often a very difficult and perplexing one, for, in statutes, as elsewhere, words are

often uncertain, and their meaning difficult to decipher. Bacon s saying, that, "Though we think we govern our words, yet certain it is that words, as a Tartar's bow, do shoot back upon the understanding, and do mightily entangle and pervert the judgment," is true. It was a saying of Daniel O'Connell that "he could drive a coach and six through almost any act of parliament." Judge Story framed a statute with great care, spending six months upon its phraseology, and yet, when called upon, within less than a year, to interpret it, he was, after hearing two able lawyers argue the question, unable to give it a construction entirely satisfactory even to himself.

The maxim that "He who considers merely the letter of an instrument goes but skin deep into its meaning," applies quite as forcibly to statutes as to deeds, contracts, or the like. Many things are to be taken into consideration—the purpose for which the statute was enacted; the evil it was intended to remedy, the condition of the law at the time, the common law upon the subject, and other matters of a similar nature. Nor is a statute to be considered as an independent rule of law, but it is to be taken as part of one great system, and into that system it must be placed with as little jarring and dislocation of parts as possible.[36] The Roman lawyer wisely said: "To know the law is not to understand its words, but to understand its import and purpose." Hobbes says, that "All laws, written and unwritten, have need of interpretation," and he acutely marks the difficulties of correctly interpreting written laws.[37]

Knowledge in regard to the law may be of two kinds; first, knowledge of what it is, and, secondly, knowledge of where to find it. The lawyer's books may be said to be his "tools in trade," and he must know how to use them. A lawyer cannot know all the statutory and common law, but he should be familiar with general principles, and legal terminology and classification, and should know where to find the law or best evidence thereof. Ordinarily, perhaps, in preparing his case, he should first consult the statutes and the digests and books of citation of cases in his own

[36] Bishop Written Laws, § 242b; Humphries v. Davis, 100 Ind. 274.
[37] Leviathan, Pt. 2; Chap. xxvi.

state and carefully read and discriminate the decisions apparently in point. Then text-books, encyclopedias of law, annotated cases, the Century Digest, and its continuation, and leading articles in the law periodicals will put him on the track of additional cases in point. Many of the text-books, leading articles, and annotations of leading and selected cases also discuss important questions on principle and make nice discriminations or distinctions. The "American Decisions," "American Reports," and "American State Reports," the "Lawyers' Reports Annotated," and the like, have very comprehensive and valuable notes; and "Current Law" and the "West System," with key numbers, are particularly useful in the search for precedents and the latest decisions.

To be available the law of the case should be condensed into compact mental judgments, and in that form woven into the mind, and not simply stored up in memory. Principles constitute the law; and, as Mr. Bishop strongly says, "The real distinction between a great lawyer and a small one is that the great lawyer looks beyond the cases as they appear on the surface of the reports to the law of the cases; looks, in other words, beyond the cases into the law precisely as, in the mechanic arts, the great operator looks beyond the mere motions which he sees going on in the machinery into those mechanical laws by which the motions are controlled, and thus understands how to do the new things which the demands of his calling present to his attention."[38] But we are not now so much concerned with what constitutes the law as with the method of preparing it for use in the actual contest. Pressing Mr. Bishop's illustration into further use, we add that the master mechanic binds into principles the mechanical laws, and is thus enabled to remember and use them when occasion requires.

The advice which the attorney-general gave to Mr. Aubrey is sound and judicious: "Always have an eye to principles." Warren represents his attorney-general as saying: "Referring everything to it, resolve thoroughly to understand the smallest details; and it will be a wonderful assistance in fixing them for practical use in your mind to learn as much as you can of the reasons and

[38] Criminal Procedure (1st ed.), § 1028.

policy in which they originated." Rufus Choate was careful to search for principles, for we find him saying of his own method of study: "My first business is obviously to apprehend the exact point of each new case which I study—to apprehend and to enunciate it precisely—neither too largely nor too narrowly—accurately, justly. This necessarily and perpetually exercises and trains the mind, and prevents inertness, dullness of edge. This done, I arrange the new truth, or old truth, or whatever it be, in a system of legal arrangement, for which purpose I abide by Blackstone, to which I turn daily, and which I seek more and more indelibly to impress on my memory. Then I advance to the question of the law of the new decision—its conformity with standards of legal truth, with the statute it interprets, the cases on which it reposes, the principles by which it was defended by the court—the law—the question of whether the case is law or not. This leads to a history of the point, a review of the adjudications, a comparison of the judgment and argument with the criteria of legal truth."[39]

Dimly outlined conceptions scattered through the mind in confusion will be of little service, if, indeed, of any service at all, on the trial. The virtues of thought in deliberate investigation are, doubtless, as Sir William Hamilton says, "clear thinking, distinct thinking, and connected thinking;"[40] but, in the heat of the contest, where the movements must be made quickly and unfalteringly, two other things are requisite—prompt thinking and decisive thinking. The principles of law must flash into the mind with lightning-like rapidity, and the application be made without an instant's hesitation. There is no time to turn the matter over in the mind, for the attention must not wander from the witness. It is a far cry from the quiet of the study to the turmoil of the trial.[41] Knowledge that will do well in the one place will do ill

[39] Brown's Life of Choate, 120.

[40] Logic, 47.

[41] As Montaigne says: "The pleader's business compels him to enter the lists upon all occasions, and the objections and replies of his adverse party often jostle him out of his course and put him upon the instant to pump for new and extempore answers and defenses."

in the other. It was said of old: "Your knowledge of many things does not give you reason or wisdom."[42]

This, certainly, is true of the advocate; he must have knowledge, and be able to make practical use of it on the spur of the occasion. It is said of General Grant that he carefully studied a map of the country over which his army was to move and his battles to be fought, but that he studied it once only, and looked at it never again, for the first study fixed it in his mind. It is this faculty of imbedding matters in the mind, ready for instant use, that makes great soldiers and great advocates. This is best done by getting the things into the mind in orderly array. Locke says of the mind: "To shorten its way to knowledge and make each perception more comprehensible it binds them into bundles." The process which the great author describes is the only one that will certainly secure knowledge that can be effectively used when occasion demands. Binding the propositions of law into bundles accomplishes a double purpose—that of making them thoroughly known, and that of laying them up where they can be made available without effort. These mental bundles should contain no rubbish, but should be composed of principles wrought out by previous thought, and freed from unsound or hurtful doctrines. These propositions should be not merely things remembered, but things known. This is the knowledge that gives real power, and makes the advocate strong when in the thick of the fight he most needs strength.[43] It is of this that comes that firm resolution which will enable the advocate to do his work with something of Luther's spirit when he said, "Here I take my stand."

"If," says Dugald Stewart, "we wish to fix the particulars of our knowledge in our memory, the most effective way of doing it

[42] Heraclitus, the Ephesian.

"James," said the father of the gifted James T. Brady to his son, "make your learning practical, for a bookworm is a mere driveler—a gossamer."

[43] "Dr. Chalmers used to say that in the dynamics of human affairs two things are essential to greatness—power and promptitude.—Dr. Brown's "Spare Hours."

is to refer them to general principles."[44] This doctrine may be extended to the acquisition of legal propositions for use on the trial of a cause, for, by laying down in the mind a general principle, or, if there are many different phases of the case, a series of general principles, and arranging the particular propositions under the principle governing the class to which they belong, a firm grasp is obtained of the law of the case. "Method may be called in general the art of disposing well of a series of many thoughts, either for the discovering of truth when we are ignorant of it, or for proving it to others."[45] The art of which Pascal speaks is the are which the advocate must attain if he would do his work effectually, for without it he can neither acquire nor transmit knowledge otherwise than lamely and imperfectly. The advice given long ago is as valuable now as ever: "Marshal thy notions into a handsome method. One will carry twice as much weight trussed and packed up in bundles than when it lies untoward, flapping and hanging about his shoulders." But it is not enough for the advocate to carry his weight without its "flapping and hanging about his shoulders," for he must carry it so that he can use each bundle effectively and without confusion when the time comes. A misplaced bundle may work almost as much injury as the misplaced leaf in the book of fate. "Method," says Mr. Lewis, "is a path of transit."[46] Whether this path be rugged or smooth, crooked or straight, will depend upon the art of the advocate.

"There is no science," says John Stuart Mill, "which will enable a man to bethink him of what will suit his purpose."[47] To no profession does this more forcibly apply than to that of the advocate. He must "bethink him" of what will suit his purpose, and when he has bethought himself of this he must "bethink him"

[44] Stewart's Elements of Phil., Chap. 6, § 12. Warren's Law Studies, 334.

[45] Port Royal Logic, 308.

[46] History of Philosophy, 718. "Books," said Bacon, "can never teach the use of books." One who cannot use his learning is in much the same situation that Artemus Ward was in when he said: "I have the gift of oratory, but I haven't got it with me."

[47] Logic, 208.

how it should be applied. He must know what he needs, where to find it, and how to use it when he does find it. Knowledge of the kind attributed to the clergymen by Mr. Tulliver, when he said, "My notion o' the parsons was as they'd got a sort of learning as lay mostly out o' sight," will do the advocate very little good. The learning which that hard-headed Englishman wanted his son to have is much more like that which the advocate needs; for a knowledge "that will enable him to see into things quick, and know what things mean, and how to wrap things up in words,"[48] is of practical value to one whose contests are in the open day, about real things, and against hostile forces. Knowledge not simply for the sake of knowledge but for actual practical use is the knowledge that equips the advocate for his work. "Professional skill," says Philip Gilbert Hammerton, "is knowledge perfected by practical application, and, therefore, has a great intellectual value. Professional life is to private individuals what active warfare is to a military state. It brings to light every deficiency and reveals our truest needs."[49] Professional skill involves more than the knowledge of books and cases, for it requires that knowledge with the added requisite of power to use it effectively. With much of truth, yet not without something of error, the author we have quoted says: "I may observe that, to be truly professional it ought to be always at command, and, therefore, that the average power of the man's intellect, not his rare flashes of highest intellectual illumination, ought to suffice for it. Professional work ought always to be plain business; work requiring knowledge and skill, but not any effort of genius."[50]

The work of preparation, whether done in gathering the facts or in securing the law, is plain business work; but, for all that, it requires professional skill of a high order.[51] He who knows

[48] Mill on the Floss, 23. "All the learning in the world," says Roger North, "will not set a man up in the bar practice without a faculty of a ready utterance of it."

[49] Intellectual Life, 408–411.

[50] Intellectual Life, 408–411.

[51] It is said of Ezekiel Webster that "he did not need to speak much, for he generally put his cases into such a shape that he got them without com-

how to do that work knows a great deal. "It is a great mistake," says Judge Baldwin, "to suppose that a lawyer's strength lies chiefly in his tongue; it is in the preparation of his case, in knowing what makes the case, in stating the case accurately in the papers, and getting out and getting up the proofs. It requires a good lawyer to make a fine argument, but he is a better lawyer who saves the necessity of a fine argument, and prevents the possibility of his adversary's making one."[52]

Written notes are well enough if not made the sole repository of the law. There is a better place for the law of the case than in written memorandums, and that place is the mind of the lawyer. Reliance on what is written will diminish real power. Authorities, however, may profitably be noted at the time the investigation is made, but the principles, and the method of applying them, are to be taken up and retained in the mind. Points may without harm be put in writing; but if too much is committed to writing, too much dependence will be placed upon it, and the mind will not work with the requisite energy and power. Compact, terse, concise propositions, full enough to arouse the required train of thought, and enable the mind to reproduce its judgments, are enough; more than this will, in most cases, do harm. Notes made when the mind is warmed to its work are freshest and strongest. Promptness will give them efficacy; delay will diminish it. The method, if clear at the first, will be clear throughout. A confused method at the outset will perplex its framer until the end. Notes methodically made and orderly arranged will be valuable, but notes huddled together in disorder and confusion will be worse than valueless. A method settled at the start and adhered to throughout will give clear, strong, distinct, and connected thought. The prudent and skilful worker will lay down his road in the beginning, survey his line, and proceed along it in an orderly way; but the careless and clumsy worker will begin badly and slovenly, and the further he goes the greater will be his perplexity and bewilderment.

ing on to trial." Letter of N. P. Rogers, quoted in Harvey's Reminiscences of Webster, 49.

[52] Flush Times in Alabama, 245.

CHAPTER III.

THE THEORY OF THE CASE.

"In determining the theory of the case Rufus Choate was never satisfied until he had met every supposition that could be brought against it."

"A theory takes a multitude of facts, all disjointed, or, at most, suspected of some interdependency; these it takes and places under strict laws of relation to each other."—*DeQuincey.*

"Facts may sometimes be explained as well by one view as another, but without a theory they are unintelligible and uncommunicable."

—*Professor Grove.*

"In its most proper acceptation theory means the completed result of philosophical induction, and theory of some sort is the necessary result of knowing anything of a subject."—*John Stuart Mill.*

"That is properly an hypothesis where the question is about a cause, certain phenomena are known and given, the object is to place below these phenomena a basis capable of supporting them and accounting for them."

—*DeQuincey.*

"The real order of experience begins by setting up a light and then shows the road by it, commencing with a regulated and digested, not a misplaced and vague course."—*Bacon.*

"First of all," says Quintilian, "let our method of speaking be settled, for no journey can be attempted before we know to what place and by what road we have to go;" and so it may be said of preparing a cause for trial after the materials have been secured, first of all let the method of conducting the cause be settled, for, adopting and somewhat expanding Quintilian's illustration, the road through the courts will be a rough one, leading, most likely, to misfortune and defeat, unless a method of conducting the case be settled and fixed in the mind. The first step cannot be safely taken in a case without a settled and certain theory. A case must be put to trial upon a definite theory; that theory the pleadings

must outline, the evidence sustain, and the law support. Not only is it necessary to frame a theory to secure a knowledge of the case, but it is indispensably necessary that it should be contained in the pleadings, for the courts will not permit an advocate to wander aimlessly about, but will keep him within the lines fixed by his theory. "It is essential to the formation of the issues, and to the intelligent and just trial of causes, that a complaint should proceed upon a distinct and definite theory."[1] It is, therefore, not possible to put a case in condition for trial without having constructed a clear and definite theory of the case, for this theory must be embodied in the pleadings, and upon the pleadings the cause will be lost or won. This principle is recognized in the elementary rules of practice, and notably so in the familiar rule of evidence that the party must recover *secundum allegata et probata,*[2] and that the evidence must correspond with the allegations, and be confined to the point in issue.

The courts have, in express and decisive terms, declared that a cause must proceed upon a definite theory, and have often denied a recovery because a wrong theory was adopted. Thus, in a reported case,[3] the plaintiff's cause was lost because the theory adopted was that the plaintiff might recover at law for the money

[1] Chicago &c. Co. v. Bills, 104 Ind. 13, 16, 3 N. E. 611; Ætna Powder Co. v. Hildebrand, 137 Ind. 462, 37 N. E. 136; Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Illinois &c. Co. v. Slatton, 54 Ill. 133; Michigan &c. R. Co. v. McDonough, 21 Mich. 165, 4 Am. 466; Lake Shore &c. Co. v. Perkins, 25 Mich. 329; Hambrick v. Wilkins, 65 Miss. 18, 3 So. 67, 7 Am. St. 631; Romeyn v. Sickles, 108 N. Y. 650, 15 N. E. 698; Supervisors v. Decker, 30 Wis. 624; 2 Andrews' Am. Law, § 646. But see 70 Central Law Journal, 294, 311, 402, 455. This rule is not strictly applied, however, in some jurisdictions, especially in equity cases.

[2] Rome Exchange Bank v. Earnes, 1 Keyes (N. Y.) 588; Lockwood v. Quackenbush, 83 N. Y. 607; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702; Caton v. Caton, L. R. 2 H. L. 127, 86 L. J. Ch. 886. See also, Stanton v. Baird Lumber Co., 132 Ala. 635, 32 So. 299; Moss v. North Carolina R. Co., 122 N. Car. 889, 29 S. E. 410, 411; Wilson v. Chippewa Valley Elec. Ry. Co., 120 Wis. 636, 98 N. W. 536, 29 Cyc. 588; 1 Elliott Ev., § 194; 2 Andrew's Am. Law, § 646.

[3] Kniel v. Eggleston, 22 Central Law Journal, 133.

loaned, while the true theory was that the claim was one that might be enforced in equity. In another case[4] the theory of the plaintiff was that he had a right to maintain an action for the recovery of specific money, but he met defeat because his theory was unsound, although upon a sound theory he would have succeeded. The general rule has been thus stated: "It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed or not succeed at all. A complaint cannot be made so elastic as to take form with the varying views of counsel."[5] A theory of the law of the case radically unsound cannot secure a right result; however strong the facts may be, a wrong theory of the law will bring ultimate defeat.

The same case may be gained on a sound theory that would be lost on a bad one. One advocate may take the same facts and secure a verdict, while another will be unable to frame a theory that can be successfully maintained. Mr. Bishop supplies an illustration.[6] A case is given by him in which goods were brought into this country in violation of our revenue laws; they passed the custom-house officers under a permit genuine in form and signature, but procured by bribery. Counsel to whom the revenue officers first applied for advice searched the statutes, and, finding no provision applying to the particular case, advised that no prosecution could be maintained. Another counsel took up the case and secured a verdict. His theory was that the case was the ordinary one of smuggling, and so he put it to trial. While the permit was offered it went in evidence, but was assailed and overthrown on the ground of fraud. The mistake of the counsel first consulted was in framing the theory of the case.

In another case counsel brought an action on a promise and succeeded, although the statute of limitations was pleaded; while, on the same facts, the first action brought for the recovery of

[4] Sager v. Blain, 44 N. Y. 445.

[5] Mescall v. Tully, 91 Ind. 96. See also, Lockwood v. Quackenbush, 83 N. Y. 607; Judy v. Gilbert, 77 Ind. 96, 40 Am. 289; Moorman v. Wood, 117 Ind. 144, 177, 19 N. E. 739.

[6] First Book of the Law, §§ 124–125.

damages for fraudulent representations was defeated by the plea of the statute of limitations. Here the result was entirely changed by the theory adopted. In still another case an action was brought on a promissory note. The defendant pleaded a discharge in bankruptcy; the plaintiff replied the general denial and failed, although if he had pleaded that the debt was a fiduciary one he would have succeeded, as many others did in cases where the facts were precisely the same in legal effect. In the one case the theory was wrong, in the others no mistake was made.

Another class of cases supplies an illustration: A man fell into an excavation in a public street made by parties licensed by the municipal corporation. The theory adopted by counsel was that the corporation was liable for the negligence of its licensees; but the theory was unsound[7] and the plaintiff was defeated. The same facts were laid before other counsel; they constructed a theory that the corporation was liable because it was chargeable with notice of the dangerous condition of the street,[8] and on this theory tried the case and secured a verdict. But it is not necessary to multiply examples, for enough have been collected to serve our immediate purpose, which is to suggest to the advocate the importance of a sound theory of the law of the case.

A mistake in devising a theory of the facts is not always fatal, but it does, in every instance, endanger the cause, and in most instances does lead to defeat. No case can be well tried upon a bad theory of the facts, and without a theory it cannot be conducted as one deserving the name of advocate would care to conduct a case. Without a theory of the facts and the law, there can be neither system nor certainty in the progress of the case through the courts.[9] Some cases are so strong that no blunderer can ruin them, but such cases are very rare. It is only cases that try themselves by their own inherent strength that can be won

[7] See 2 Elliott on Roads and Streets (3d ed.), § 816.

[8] See 2 Elliott on Roads and Streets (3d ed.), § 806, *et seq.*

[9] "Nor is it a slight benefit," says Cardinal Newman, "to know what is needed for the proof of a point, what is wanting in a theory, how a theory hangs together, and what will follow if it be admitted."

without a theory of the facts as well as of the law, and in such cases no advocate is needed.

The contests of the forum are often likened to battles, and terms and suggestions are often borrowed from the art of war. Frequent use is made of such terms as the plan of "the campaign," the "line of action," or "line of defense." Rufus Choate said of the advocates who defended Professor Webster, "that they should settle on their certain line of defense."[10] The great advocate displayed, we may say in passing, a just conception of the true theory of the defense, and a keen perception of the weakness in the one adopted. His judgment was that the theory of the defense should not have been that the remains found in the furnace in Webster's laboratory were not those of Dr. Parkman, but that the theory should have been so constructed as to require the government to show whether Parkman came to his death by visitation of God, or whether the killing was the result of a sudden quarrel, or was done in self-defense. Returning from this slight digression, we say that the terms borrowed from military science are not without relevance and force, but they are, while expressive and forcible, apt to mislead if the ideas they suggest are too closely followed in the work of preparing and putting a case to trial. The term "theory of the case" is generally used by the courts, and is, perhaps, as expressive and accurate as any general term can be.

A theory of the case is a comprehensive and orderly arrangement of principles and facts, conceived and constructed for the purpose of securing a judgment or a decree of a court in favor of a litigant. The object sought is the judgment of the court, and the theory is the means to that end. A theory of a case is more than a provisional fiction, although it may contain many suppositions or conjectures; it is more that a plan, although it is a systematic compendium of details; it is more than a system of conjectures, although it contains many hypotheses. It is a mental creation, embodying the principles of action, the scheme of conduct, and the methods of procedure. It is more than a fiction, for it is a mental representation of a real case, conceived for an

[10] Nelson's Memoirs of Rufus Choate, 18.

actual purpose, and such representations are not fictions, although they are intangible. It is different from a plan, because it not only marks out what is to be done, but also accounts for many facts, and places a foundation beneath many principles. The framer of a theory does, in some degree at least, take upon himself the dual character of architect and philosopher. In so far as he devises and marks out a plan, his duties are those of an architect; while in so far as he accounts for facts, or supplies hypotheses for the support of principles, his duties are those of a philosopher.[11]

The word "theory" is sometimes used as meaning a mere speculative scheme, either purely visionary, or framed without any view to practical use. It is in other cases used to denote a philosophical explanation of some physical phenomenon, as Wells' "Theory of Dew," or Tyndal's "Theory of Light." In other cases it is used as signifying an explanation of some moral or ethical subject, as Adam Smith's "Theory of Moral Sentiments," or "The Theory of Ethics." In still different cases it is used as meaning the exposition of the principles of a science, as the "Theory of Thought," "The Theory of Music;" and in other cases it is used to denote the philosophy of a branch of science, as "The Theory of the Common Law." It is evident that no one of these definitions, taken in itself, conveys an adequate meaning of the term when used as indicating the scheme, or plan, of an action at law or a suit in equity. A theory of a case contains all the elements of the various theories described in these definitions. It is, however, never a mere speculative scheme, although many of the principles of law which enter into its composition are the products of speculative thought. The speculation which produces, or discovers, these principles is guided by analogy, is directed to a certain end, and is undertaken for a real purpose. Many of these principles are obtained by inductive investigation; others

[11] "One great obstacle to progress and improvement," says Dr. Rees, "has been the neglect of practice in speculative men, and the ignorance or contempt of theory in mere practical men." The definition of the theory of the case given in the text is quoted, and the importance of the theory is also emphasized in Cooley's Brief Making, etc. (2d ed.), 208.

are deduced from established maxims and axioms. By whatever method these principles are obtained, they require development and exposition. The facts are gathered by observation and from evidence, but their existence and effect are to be accounted for and extended by hypothesis and inference. The facts which we obtain from testimony or observation supply the basis for an inference which often leads to results far beyond the immediate influence or effect of the observed or proved fact itself, and conjecture is often necessary in order that the work of inferring shall take the proper direction. The proved facts, the inferential results springing from them, as well as the conjectures as to the manner and reality of their existence, will be ineffective, if not unintelligible, unless put into an orderly and systematic form. There is, therefore, in the theory of a case, a collection of many and different things resulting in the formation of a mental structure which has in it some of the qualities of a plan, many of the characteristics of a scheme, many of the features of a system; and, when fully developed, this structure becomes an exposition of principles and facts.

The word "theory" is very frequently used as signifying the foundation of a rule of law. Thus it is said: "The theory of prescription rests upon the presumption of a past grant." Again, it is said that, "the theory of title by limitation is that the repose of society requires that long continued possession shall not be disturbed." The case of Miller v. Brours, 47 Mo. 504, supplies an illustration of the conflict of rival theories of law. It was said in that case: "The two leading theories are that, as to her separate estate, the wife is a *feme sole;* that she may contract debts, as though unmarried, for the payment of which her property is holden. Upon this theory it cannot matter whether the debt be evidenced by a written instrument or not, if it is established to be her debt. The other theory is that the grant of a separate estate does not give the wife a credit based upon it." The case of Sherley v. Billings,[12] supplies an illustration of the use of the word as denoting the rule upon which decisions were based, the

[12] 8 Bush (Ky.) 147, 8 Am. 451.

court saying: "These cases are based upon the theory that the responsibility of the appellant to the appellee was no greater than it would have been had the latter been a stranger instead of a passenger. This theory is incorrect."

The word "theory" is frequently used where "hypothesis" would more clearly and accurately express the idea intended to be conveyed. The terms are not synonymous; for theory means something of a more permanent and complete character than the thing denoted by the word "hypothesis." A lawyer who should say he had formed a theoretical question for an expert witness would not convey his real meaning; but if he should say he had framed an hypothetical question there would be no uncertainty as to the meaning intended to be conveyed. Where a supposition or conjecture is made for the purpose of explaining or accounting for a fact, an hypothesis is formed, and when this becomes settled by investigation and proof, a theory is constructed, which takes the place of the hypothesis. In general, however, theory means something more than the explanation of an isolated fact.[18] Suppose the case to be that of a man accused of murder, and that blood-stains are found upon his garments; the hypothesis of the prosecution would be that the stains were caused by the blood of the murdered man; and this would form one of the criminative circumstances adduced against the accused. The counsel for the prisoner would reject this hypothesis, and endeavor to frame another and, if possible, more probable one. His first work would be that of conjecture, his next that of investigation. If, in the course of his investigation, he should discover something likely to produce the stains, as, for instance, that his client had been slaughtering an ox, he would adopt the hypothesis that the stains were caused by the blood of that animal. The hypothesis would only account for one of many of the facts of the case, and it is evident that in such a case as that supposed, as, indeed, in almost all real cases, there would be many other facts to be explained or accounted for. There are, therefore, in every complicated case

[18] Dr. Wharton says: "The facts are meaningless unless they fit to an hypothesis."

many hypotheses, and these are to be gathered up and arranged in an orderly and systematic scheme.

DeQuincey has acutely marked the difference between a theory and an hypothesis, saying: "A theory, therefore, may be defined: an organic development to the understanding of the relations between the parts of any systematic whole. But in a hypothesis it is only one relation which is investigated, viz.: that of dependency. A number of phenomena are given, and perhaps with no want of orderly relation amongst them, but as yet they exist without apparent basis or support. The question, therefore, is concerning a sufficient ground or cause to account for them. I, therefore, step in and underlay the phenomena with a sub-structure, or sub-position, such as I think capable of supporting them. This is a hypothesis. Briefly, then, in a theory I organize what is certain enough already, but undetermined in its relations; whereas, in a hypothesis I assign the causality where it was previously unknown." He concludes his discussion by affirming that "Theory is ordination; hypothesis is substration."[14]

It is no doubt an important part of the theory of a case to organize into a systematic compendium the principles of law and matters of fact known to the advocate, but it is not less important that the hypotheses which, in every complicated case, are necessary to account for the conclusions of fact essential to success, should have placed under them a "sub-structure" of minor facts that will make them appear to be true. These conclusions of fact, which are the points that in a great measure control cases, must be so underlaid that their probability will be so strong as to carry conviction. The advocate must, as DeQuincey says, "step in" and underlay these conclusions, which are in reality hypotheses, with such a sub-structure as will give them support. The advocate must, in almost every case, advance beyond the facts directly established by the evidence. He must deduce conclusions from the facts directly proved, and this is done by framing hypotheses. They are bridges which carry him across gaps and chasms which would otherwise be impassable. It is said by Uberweg that "The formation of hypotheses is a means to scientific investigation as

[14] DeQuincey's Writings, Vol. IX; Houghton, Mifflin & Co. ed., 604.

justifiable as indispensable,"[15] and that this is true is proved by the course pursued by those who have made great discoveries in the physical sciences, as well as by the practice of those who have been great trial lawyers. Choate's success was owing quite as much to his acuteness in constructing hypotheses as to his eloquence. Scarlett, "the great verdict-getter," was not an orator, but he was a scientific framer of hypotheses. It will be evident to one who carefully studies the jury arguments of Erskine that much of his success was owing to the dexterity with which he framed his hypotheses, although his wonderful power as a speaker added greatly to his success. Take, for instance, his grand defense of Hadfield, and it will be found that, eloquent as his speech was, it was the dexterity with which he framed his hypotheses, quite as much as his arguments, that induced Lord Kenyon to inform the attorney-general, upon the conclusion of the prisoner's evidence, that "the case should not be proceeded in."

Webster's conduct of the prosecution and defense of causes exhibits the same great skill in constructing hypotheses; and of this his speeches in the prosecution of John F. Knapp, and in defense of the Kennistons for the robbery of Major Goodridge, supply ample proof. Perhaps no hypothesis was ever more clearly conceived by any advocate, or more vividly placed before a jury, than that of Webster as to the manner in which the murder of Joseph White was committed.

The study of the speeches of great advocates becomes much more interesting and far more profitable if the reader searches for and grasps the hypotheses which the speaker has framed before entering upon his work; for, to borrow something of Southey's thought and language, "as the beams to a house, as the bones to the microcosm of man," so are the hypotheses to the speech of the advocate. It is said by a German thinker that: "The intelligent man is not he who avoids hypotheses, but he who asserts the most probable, and best knows how to estimate their degree of probability. What is called certainty in a law case is at bottom only the probability of the hypothesis which refuses to

[15] Logic, 506.

admit the possibility of error in the mind of the judge."[16] It is certainly true that the intelligent lawyer is not the one who avoids hypotheses, for he knows that upon them chiefly rests his hope of success in all intricate cases. Their force depends in a great degree upon their probability. Jurors will give little heed to improbable hypotheses; but it is not always the bold hypothesis that is improbable. The circumstances may be such as make a bold hypothesis the most probable that can be framed. "But to the most ingenious boldness in the invention of hypotheses there must be united the most cautious accuracy in testing them. Scientific hypotheses are not assertions which have been floating in the air and are laid hold of; they are the result of regular reflection on experiences." The test must be that of probability and the guide that of experience. Mere airy speculations or visionary conjectures will miserably perish in the fierce clash of the contest. Only such hypotheses as are rational, conform to experience, and are supported by probability, will stand the rough usage they will receive in the forum.

Strange or unnatural hypotheses are expedient only in extraordinary cases.[17] In the cases which ordinarily arise strange or fanciful hypotheses are never to be framed, for an ordinary case thus decked out would look so improbable that success would be impossible. But, whatever the demands of the case, the cardinal rule is to frame such hypotheses as shall appear probable. Edgar A. Poe was very dexterous in framing marvelous hypotheses and giving them an air of probability; nor was he less skilful in detecting an unsound hypothesis than in constructing natural ones, and a study of some of his productions is, for this reason, if for no other, instructive and profitable.[18] But, whether the

[16] Uberweg Logic, 507. See also, Chicago &c. R. Co. v. Pritchard, 168 Ind. 398, 412, 79 N. E. 508, 81 N. E. 78.

[17] That there are cases in which they may be expedient is shown, however, by the effect of the theory advanced by Rufus Choate in Furst's Case, Brown's Life of Rufus Choate, 179. The bursting of the dam in Charles Reade's "Put Yourself in His Place," which was at one time regarded as impossible, has since been shown to be probable by a similar occurrence in Massachusetts and by the Johnstown disaster.

[18] The Murder in the Rue Morgue is a striking illustration of Poe's

hypothesis be a strange one or an ordinary one, it must not be improbable. As Uberweg says, "The hypothesis is the more improbable in proportion as it must be propped up by artificial auxiliary hypotheses. It gains in probability by simplicity and harmony, or identity, with other probable or certain suppositions."[19]

Hypothesis precedes theory. "An hypothesis," according to Mill, "is any explanation which we make, either without evidence, or on evidence avowedly insufficient, in order to deduce from it facts which are known to be real." According to Uberweg: "Hypothesis is the preliminary admission of an uncertain premise, which states what is held to be a cause in order to test it by its consequences." Men in every day life form hypotheses, and often in regard to common occurrences. A wagon is overturned or a mill stopped, and the first mental act of one interested is to form some conjecture as to the cause of the accident. In commercial life the most successful men are those who are most sagacious in forming hypotheses. Here, as elsewhere, probabilities are to be measured, and the results to be accepted as not only accounting for what is past, but as, in some degree, predicting what will happen in the future. It is, therefore, a mistake to suppose that only philosophers and lawyers make use of hypotheses. It may, indeed, be doubted whether there is any calling in life in which use is not made of hypotheses. Mr. Mill has depicted the process which men habitually pursue, oftentimes without being conscious of their own mental operations. "Let any one watch the manner in which he himself unravels a complicated mass of evidence; let him observe how, for instance, he elicits the true history of any occurrence from the involved statements of one, or of many, witnesses; he will find that he does not take all of the items into his mind and attempt to weave

skill in making a strange theory seem probable, and the Mystery of Marie Roget is a remarkable exhibition of his skill in constructing a natural hypothesis. Some of the Sherlock Holmes stories of Conan Doyle, and other detective stories exhibit considerable ingenuity of the same kind, but many of them will not bear analysis. See also, Mr. Post's "Strange Schemes of Randolph Mason" and "Man of Last Resort."

[19] Uberweg Logic, 506.

them together; he extemporizes from a few of the particulars a first rude theory of the mode in which the facts took place, and then looks at the other statements one by one, to try whether they can be reconciled with that provisional theory, or what alterations or additions it requires to make it square with the facts."

What Quintilian calls a conjecture is very much the same thing as that which is now usually denominated an hypothesis. John Locke's *guess* is a crude hypothesis, as is evident from such passages as: "This appearance of theirs in train, though perhaps it may be sometimes faster and sometimes slower, yet, I *guess,* varies not much more in a waking man." The truth is, that all guesses and conjectures are crude hypotheses, and men are engaged in forming them who are ignorant of the mental operation. They are formed to account for things happening every day. The carter's wheel flies off the axle of his cart, and his hypothesis is that the linch-pin has fallen out. The gardener's seeds are dug up and he sees the tracks of chickens, and his hypothesis is that the mischief was done by them. The faculty of promptly and accurately framing an hypothesis that will account for an occurrence is one of great value, no matter in what pursuit its possessor is engaged, but to the philosopher, the physician and the lawyer it is indispensable. No learning, however great; no study, however assiduous, will supply its place. This faculty can be strengthened and improved by exercise. For proof of this, if proof be needed, we need only instance the readiness and accuracy with which the experienced physician frames an hypothesis, accounting for the presence of the symptoms which he observes in his patient, or the promptness and certainty with which the thinking mechanic accounts for a defect in a complicated machine. It is not too much to say that no calling of life requires, as a condition of success, a higher development of this faculty than does the profession of the advocate. It is impossible to conceive clearly the principles of law governing a case without an hypothesis, and it is not less difficult to understand the facts and comprehend their relation and effect without one.

Hypothesis is not only essential to the acquisition of adequate ideas by the thinker himself, but it is also essential to an intelli-

gent communication of them to others. Professor Grove says: "Let us use our utmost effort to communicate a fact without using the language of theory, and we fail. Theory is involved in all our expressions; the knowledge of by-gone times is imparted into succeeding by theoretic conceptions. As the succeeding knowledge of any particular science develops itself to our view it becomes more simple, hypotheses, or the introduction of suppositious views, are more and more dispensed with, words become more directly applicable to the phenomena, and, losing the hypothetic meaning which they necessarily possessed at their inception, acquire a secondary sense, which brings more immediately to our minds the facts of which they are indices. The hypothesis fades away, and a theory, more independent of supposition, but still full of gaps, takes its place."

In the process of forming a theory we exercise not only the understanding but also the imagination. It is impossible for an observing or reflecting man to pass one day in the ordinary business of life without having made some use of the representative faculty. Imagination is commonly supposed to be opposed to the useful and practical; but this, like many other theories, is, as it is easy to prove, altogether erroneous. We do use the imagination in the most matter of fact affairs of life, and in the dryest and most abstruse sciences.[20] Sir William Hamilton declares that it is essential to the successful cultivation of every scientific pursuit, and that "it may well be doubted whether Aristotle did not possess as powerful an imagination as Homer."[21] Sir Benjamin Brodie says that when controlled by experience "it becomes the noblest attribute of man, the source of poetic genius and the instrument of discovery in science." Prof. Tyndale, in his lecture on the "Scientific Use of the Imagination,"[22] affirms that it is one

[20] We are not unmindful that the popular view of the lawyers, the "sons of Zeruiah," as Cromwell's Puritans called them, is, that they are gifted with imaginations entirely too fertile; but we beg leave to explain that the imagination which we commend is the scientific imagination, which seeks images of truth, and not their counterfeit presentment.

[21] Lectures on Logic, 426.

[22] Fragments of Science, 127.

of the most important of all the faculties in the investigation of scientific truths, and beautifully says: "In the dim twilight of conjecture the searcher welcomes every gleam, and seeks to augment his light by indirect incidences." Professor Washburne, in speaking of the imagination, says, that by it the lawyer "is often able to guess out and anticipate what he has to meet in his adversary's case, and thus forestall the effect of what he is to bring against him by being prepared to counteract it."[23] We think that Professor Washburne limits the use and office of the imagination entirely too much. It is, it seems to us, as essential in framing hypotheses to support the advocate's own case as it is in ascertaining what his adversary will likely bring against him. It supplies the means of advancing from the direct evidence to the ultimate facts; it supplies the light which discloses the road that leads to a successful termination of the investigation. But for this faculty progress would sometimes be impossible. An investigation pursued in darkness can only result in obscurity and doubt. If the investigator can vividly imagine the object he seeks to reach, and the road to it, he is much more likely to reach it than if he stumbles on without any definite end in view. "Be our business in life however prosaic," says Bulwer, "we shall not attain any eminent success if we despise the clairvoyance which imagination alone bestows. No man can think justly but what he is compelled to imagine; that is, his thoughts must come before him in images. Every thought not distinctly imaged is imperfect and abortive."[24]

Quintilian says that, "In regard, then, to everything that is done, the question is either why, or when, or in what manner, or by what means it was done," and these questions are not always answered by the information which the advocate secures at the commencement of his work. Where there is evidence bearing upon all of these questions the answers are there found, but it is seldom that the direct evidence furnishes answers to all the material questions that arise in the cause—sometimes, indeed, not to any of them—so that the only course open to the investigator is that of conjecture, and in that process imagination is a most

[23] Lectures on the Study and Practice of Law, 10.
[24] Caxtonia, 49.

potent instrument. It advances answers which, if not always correct, at least open and light the way to an intelligent investigation. It may be that the understanding will reject the answers at first suggested by the imagination, but, if so, repeated attempts will be made until some answer is suggested that will receive a favorable judgment. If it were not for the materials presented to the mind by the imagination there would, in many cases, be nothing upon which the understanding could work. The imagination presents, it may be, various hypotheses or conjectures; these the mind tests, rejecting those it judges untenable, and accepting those it judges reasonable. If it were not for these conjectures no real progress toward explaining or accounting for a transaction involved in obscurity or mystery could be made. The really great advocates employ the imagination quite as much in the work of securing materials for the constrution of probable hypotheses as in embellishing their addresses. This is true of the most brilliant and eloquent of the great trial lawyers, and the study of their addresses is much more valuable when directed to a discovery of their use of the imagination in constructing hypotheses than when directed merely to their graces of diction.

The most effective work done by the advocate is in constructing hypotheses that will lead to a favorable decision, for it is true that in by far the greater number of cases it is not the beauty of diction nor the wealth of imagery that wins the contest, but the skilfully framed hypotheses. Take, for example, the brilliant Sargent S. Prentiss and analyze one of his most ornate addresses, that in behalf of Wilkinson, and it will be found that he used his imagination quite as much in framing hypotheses as in ornamenting his address. He outlines his principal hypothesis at the outset, and concludes his discussion of it by saying: "I have exhibited to you an almost countless variety of circumstances, the occurrence of which, or any great portion of them, is absolutely incompatible with any hypothesis than that of the conspiracy which at the outset I proposed to prove. Upon that hypothesis all these circumstances are easily explicable, and in accordance with the ordinary principles of human action." Take an advocate of another class, for instance, Charles Phillips. He was not lacking

in imagination, but it was not one valuable to the lawyer, and his speeches, being destitute of hypotheses, are little more than empty words expressing no thoughts. They seem like a tawdry suit of clothes upon a lifeless body.

Provisional or working hypotheses are valuable in prosecuting an investigation. "In the course of a research many suppositions are made, and rejected or admitted according to the evidence."[25] We know, for instance, that a man was found mangled and dead on a railroad track, and that he was seen a few minutes before his death in a violent altercation with an enemy. If we knew no more, our provisional hypothesis would be that he entered on the track and was killed by a passing train; for we would have no right to presume that his enemy slew him. If, however, we should find that he had been killed by a pistol ball, then our provisional hypothesis would be that his enemy had killed him. But if, pressing the investigation further, we should discover that his money and watch had been taken, and should also find them in the possession of a stranger, who could give no account of his possession, our previous provisional hypotheses would be rejected, and we should conclude that the stranger was the murderer.

A working hypothesis cannot be allowed to take a place in the theory until it has been tested. It will often happen that many provisional hypotheses will fall before a vigorous test. If the hypothesis does not stand the test it must be rejected, although it may have been a favorite one. A source of error in all investigation is the tenacity with which men cling to a theory or hypothesis of their own construction. The reports furnish many instances where cases have been lost because counsel could not, or would not, throw aside a favorite hypothesis. In a practical science like the law there is little tolerance of fanciful hypotheses, and only such as will stand the severest test will be accepted by the courts. It is no doubt painful to yield an hypothesis born of careful study, but when the facts, as they develop, disclose its unsoundness it must be cast aside. It is not wise to attempt to make the facts bend to a provisional hypothesis, unless it is the only one which

[25] Bain's Logic, 327.

will avail. When this is the case, then the facts must, if possible, be molded to fit the hypothesis.

The provisional or working hypothesis is an important factor in investigating matters of law as well as matters of fact. Investigation of the law of a case can only be successfully prosecuted —except when same lucky accident intervenes[26]—where the mind of the investigator is governed by some definite purpose and seeks to attain a definite object. If the searcher, at the outset, frames a provisional hypothesis, and then sets out to find authority to support it, he will have a guide throughout his exploration. He will certainly reach one of two results, for he will discover that his provisional hypothesis is or is not the correct one. Even if he acquires no other knowledge than that his hypothesis is invalid, this knowledge will have the merit of distinctness, if it has none other. But it is most likely to point to the true hypothesis. Suppose, for example, the facts of the case to be these: The defendant orally promised the plaintiff to indemnify him against loss if he would undertake as surety on the bail bond of John Doe. Suppose the hypothesis is provisionally assumed to be: This verbal contract is within the statute of frauds and is not enforceable. In testing the hypothesis it will be found incorrect;[27] but an important step of progress has been made, for we have ascertained that the hypothesis is not sound, and therefore, upon a plain, logical rule, conclude that the contradictory hypothesis is the true one. Take another and somewhat more complex example: The defendant leased to Richard Roe a building. Roe subleased it to John Doe. The building was negligently suffered to get so much out of repair as to be unsafe, and the plaintiff, in going to a public entertainment held in the building, stepped into a hole and was injured. Here the question of law would be as to the party liable. If the working hypothesis be that the defendant is liable, it would be unsound because the tenant, and not the

[26] Lucky accidents or conjectures are rare in law suits. "Depend upon it," says Miss Austen, "a lucky guess is never merely lucky—there is always some talent in it."

[27] Wood on Frauds, 289; Anderson v. Spence, 72 Ind. 315.

landlord, would be liable.[28] But although the provisional hypothesis is erroneous, still it is of great practical benefit, because it brings out into a clear light one of the great questions in the case, and thus leads to the discovery of the governing principle, which is the true hypothesis that is to be incorporated in the theory of the case.[29] In truth, every proposition of law is at the first a mere unproved or provisional hypothesis. It is not always necessary to refer to books to prove it, for it is proved, and sometimes without conscious effort, by reference to principles laid away in the mind. Until verified, it is nevertheless a mere supposition, not entitled to be placed in the theory of the case. As long as it stands as a mere unproved assumption it is unsafe to attempt to advance or to depend upon it.

Hobbes quaintly says: "The best prophet is naturally the best guesser, and the best guesser he that is most versed and studied in the matter he guesses at, for he hath the most signs to guess by."[30] The more signs the investigator discovers the swifter his conjectures, and the sounder his hypotheses. Not only is this search for signs of great benefit in the preparation of the case, but it is also of great assistance in the trial, for it arouses attention to the points in the case, and enables the mind to instantly perceive and grasp all the favorable facts developed in the progress of the trial. One who has thought intently upon a matter, and has sought diligently for signs to enable him to discover the true solution of a difficulty, will catch and apply facts that another would pass almost unnoticed. This is strikingly illustrated in the case of inventors; they frame some hypothesis, perhaps an erroneous one, and in the course of their experiments carefully seize and apply each important fact, which one whose mind had not been thus prepared would not observe. The commissioner of patents supplies an apt example in his description of Goodyear's discovery: "In one of those animated conversations so habitual

[28] Ryan v. Wilson, 87 N. Y. 471, 41 Am. 384; Cole v. McKey, 66 Wis. 500, 29 N. W. 279, 57 Am. 293.

[29] Quintilian supplies an example of the use of hypothesis. Inst. Bk. V, Chap. X.

[30] The Leviathan, Pt. I, p. 11.

to him, in reference to his experiments, a piece of India rubber, combined with sulphur, which he held in his hand as the text of all his discourses, was, by a violent gesture, thrown into a burning stove near where he was standing. When taken out, after having been subjected to a high degree of heat, he saw—what it may be safely affirmed would have escaped the notice of all others —that a complete transformation, and that an entirely new product, since so felicitously termed 'new metal,' was the consequence."

It greatly impairs the strength of the theory of the case if improbable or untenable hypotheses are incorporated in it. The evil result does not end with the overthrow of the untenable hypothesis; it extends much further. Jurors are very apt to imagine that if there is one worthless hypothesis there must be many more; for men usually conclude that errors, like evil things, "do mostly travel in great companies." Logically, the overthrow of an hypothesis ought not to extend beyond the point directly affected, but jurors do not always adhere to logical rules; on the contrary, if they perceive error on one point they generally extend it to many. It is much better, therefore, to have a few natural and probable hypotheses than many probable ones and some improbable ones. The mind of the investigator himself is likely to be led astray by one improbable hypothesis, although it be in a train with many valid ones, and for his own safety in preparing his case it is necessary to separately test and verify each hypothesis. If this is not done, the whole fabric may be imperiled. "One devious step," says Richardson, "at first setting out frequently leads a person into a wilderness of error."

A mere fanciful theory of the case, however artfully constructed, is not a good one, for such a theory will lack the essential element of probability. A theory containing many improbable hypotheses is a bad one. Certainty is not required, but there must be probability. Lord Mansfield said, in delivering one of his judgments: "It is an undoubted truth that judges, in forming their opinions of events and in deciding upon the truth or falsehood of controverted facts, must be guided by the rules of probability; and as mathematical or absolute certainty is seldom to be

attained in human affairs, reason and public utility require that judges and all mankind in forming their opinion of the truth of facts should be regulated by the superior number of probabilities on the one side or the other."[81]

The probability of a theory depends upon the details almost as much as upon its general frame, for one improbable circumstance may break down the whole structure. The skilful selection and arrangement of details, so that one shall naturally seem to follow another, and all unite in establishing one central conclusion, makes a theory impregnable. It is, therefore, of no little importance that the facts be made to follow in natural order; that is, as if the one naturally resulted from the other without extrinsic aid. In this order they must be lodged in the mind of the advocate, so that when they emerge in the course of the development of the theory they shall appear to grow out of each other without the appearance of having been brought together by a preconceived plan. As the facts come out in evidence so will they find lodgment in the minds of the jurors, and if they grow out of each other they will take form there as compact and strong as a "Roman legion." If jurors are compelled to collect together disconnected facts and arrange them in their minds, they will get obscure and confused ideas, and will lose sight of many important facts, as well as entirely fail to recognize the relation existing between a series of facts.

It is scarcely less important that the relation between facts be kept prominently in view than that the facts themselves be made conspicuous, for relation adds strength, and often makes facts convincing by the probability with which it clothes them. It is not to be expected that jurors, in the swiftly passing hours of a trial, can establish the relation between facts. To do this work skilfully and well requires careful deliberation and a disciplined mind. The relation between a series of facts, and its importance, will be quickly apprehended when pointed out; but it

[81] Theory of Presumptive Proof, 62; Burrill's Circumstantial Ev., 23; City of Terre Haute v. Hudnut, 112 Ind. 542, 557, 13 N. E. 686. See also, McCarty v. State, 162 Ind. 218, 70 N. E. 131; Cunard S. S. Co. v. Kelley, 126 Fed. 610, 617, 61 C. C. A. 532.

sometimes requires a keen vision to clearly note the relation and justly point it out. The probability of a theory is the great end to be attained, and one of the chief things in clothing it with probability is that of clearly and strongly establishing a natural relation between the facts, and of unfolding them to the jury so that they may perceive that one grows out of another, as though their development could take place in no other way.

It is seldom that a case arises in which the relation between a series of facts is not one of the most important elements in establishing probability; but there may be cases where a single fact rules and decides the controversy, and in such a case all that is needed is to make that fact so conspicuous that it cannot be overlooked, so that the simpler the theory the better. The instances are few in which there is no necessity for establishing and developing a relation beteween the facts in order to make the theory probable. Error is not unfrequently committed in assuming that one or two material facts so fully control the case as to need no aid from subsidiary facts, and to avoid this error it is necessary to carefully consider the probable effects of these facts as well as the force of facts that will probably be brought against them. It is natural, for instance, to assume that one seen with a pistol in his hand near the dead body of a person slain by a pistol shot is the murderer, and yet it would be hazardous to depend on that circumstance alone, for it might be explained on many hypotheses; but if to that circumstance be added evidence of previous threats on the part of the accused, or evidence that he bore a grudge against the deceased, the guilt would be so probable as to render conviction certain. This is a very simple case, devoid of all complexity, and yet it illustrates (what, indeed, is so plain as to scarcely need illustration) the importance of securing subsidiary facts, and so arranging them that their relation shall clearly appear, that it shall seem only the natural one, and that it shall so bind the series of facts together that they will constitute a line leading to the desired conclusion.

It will be found that by far the greater number of cases are complex, composed of principal facts surrounded by minor ones, and that the strength of the case depends, not so much upon these

principal facts alone, as upon the support given them by the probabilities created by establishing and developing the relation of the minor facts. It is not possible to accurately determine the relation between facts without looking at them from opposite sides, for it very often happens that contestants will claim with plausibility that the relation of the minor fact is such as to support their respective contentions. It is often claimed for the defense in criminal trials that the malignity of the homicide shows insanity, while on the part of the state the same fact is relied on as establishing one of the principal elements of the crime, and the fact establishes one or the other of these hypotheses according to its relation to the other facts. Thus, if it should appear that the previous relations between the slayer and the slain were those of love and affection, the ferocity of the crime would tend in a strong degree to establish the probability of the hypothesis of the defense; but, if it should appear that there were hatred and ill-will, then the ferocity manifested in the manner of committing the homicide would strongly tend to support the hypothesis of the prosecution. The illustration given is a simple one, but in practise few such simple cases are encountered, for, in the great majority of cases, the facts are complex, the gaps unfilled by positive testimony are numerous, and the details spread over a great field, so that no probable theory can be formed without carefully establishing and developing a natural sequence between the facts.

The validity and value of a theory depend upon its power to inspire a belief that it is true, for what creates a belief of truth is accepted as a satisfactory solution of the controverted questions of fact in the contests of the forum. Belief in matters of law is conviction, since demonstration cannot be attained. What men thoroughly believe they accept as true. A theory which so strongly commends itself to the judgment of men as to create a strong belief of its truth is the path to success. Knowledge in all matters not susceptible of demonstration is, at bottom, belief. Men think, and not unreasonably, that they have attained knowledge, when they have, in fact, attained a settled belief. The child

does not doubt its mother's love, and yet no higher certainty of its existence can be attained than a belief that it exists. Dr. McCosh has some very sound observations upon this subject, and supplies this apt quotation from Gœthe: "I receive mathematics as the most useful and sublime science as long as they are applied in their proper place, but I cannot commend the misuse of them in matters which do not belong to their sphere, and in which, noble science as they are, they seem to be mere nonsense; as if, forsooth, things only exist when they can be mathematically demonstrated. It would be foolish for a man not to believe in his mistress' love because she could not prove it to him mathematically. She can mathematically prove her dowry, but not her love."[32]

If the hypotheses which form part of the theory, and the evidence on which they rest, are such as awaken a firm and decided belief, there is conviction. To secure this belief in the right and justice of his client's cause is the leading purpose of the skilful advocate, and this purpose leads him to so construct his theory that men will believe it. This is done by making it appear that the jurors, had they been in the situation of the witnesses, would have seen what they saw, would have testified as they testified, and would have acted as the parties are represented to have acted. "As in water face answereth to face, so the heart of man to man," says the proverb; and men believe what they suppose it likely they would themselves have said or done, but reject that which it seems to them they would not have done had they been situated as the parties were, and of like character and disposition. If the jurors are convinced that a man is wicked, then they are ready to believe that he has done a wicked deed; but if they are convinced that he is good, they are slow to believe evil of him. This is one great reason why character is so often of importance to a person accused of crime; and it is for this reason that the witness whose demeanor shows him to be honest so often carries conviction to the minds of the jurors as against many witnesses.

A theory which is unbelievable is a bad one. Of such a theory, Bacon supplies an apt and an amusing example in the story of

[32] Logic, 101.

the thief who averred, "That passing over several grounds about his lawful occasions, he was pursued close by a fierce mastiff dog, and so was forced to save himself by leaping over a hedge, which, being of an agile body, he effected; and in leaping, a mare standing on the other side of the hedge, he leaped upon her back, who running furiously away with him, he could not by any means stop her until the next town, in which town the owner of the mare lived, and there he was taken and arraigned."

The theory framed by Dickens' great criminal lawyer, Jaggers, in defense of the woman who afterward became his housekeeper, is an example of one that men would readily believe true, because consistent with experience.[33] A very ingenious and well-constructed theory is that of DeQuincey in behalf of Judas Iscariot. It is, indeed, a marvelous exhibition of skill in constructing and maintaining a theory that goes far to secure belief, although based upon a very slender foundation of fact.[34]

The theory of the defense in the Webster case is an example of one lacking the virtue of probability. In that case the principal hypothesis, and the one which really constituted the theory of the defense, was, that Dr. Parkman was killed after leaving the medical college, by some person unknown to the prosecutor or the defendant, and his body carried into the rooms occupied by Webster, and there disposed of and concealed. This was in itself a highly improbable theory, and when applied to the facts developed by the evidence its improbability was greatly increased. A far more probable theory for the defense was that suggested by Choate, which we have already stated. The theory adopted by the prosecution was much more probable, and was simple and natural in its construction and development. That theory was that the deceased, between two known hours of a designated day, entered the lecture rooms of Professor Webster; that there was an interview between the two men; that Parkman never left the

[33] Great Expectations, Chap. XVIII.

[34] Works of DeQuincey, Vol. VIII, page 223. Another admirable piece of work of this character is that of Mr. Birrell in defense of Falstaff, although its rich vein of humor detracts somewhat from its effectiveness as a defense of a man of many infirmities. Obiter Dicta, 200.

rooms alive; that the parties never separated; that Parkman was then and there slain, the remains disposed of by Webster, and by him kept concealed until their discovery the week after the murder.[35] Cicero's theory of Milo's defense possesses in a high degree the virtue of probability, and had it been developed to the judges Milo would most likely have been acquitted. The theory of the defense in the case of Mrs. Wharton, indicted for the murder, by administering poison, of General Ketchum, was that he died from the effects of laudanum with which he secretly dosed himself; and so probable seemed this theory to the jury that it did much to secure a verdict of acquittal, although subsequent developments in medical science tend strongly to show that neither the hypothesis of the prosecution nor that of the defense was the correct one, but that death resulted from a disease then comparatively unknown to the physicians of that part of the country.

The consequence to which a theory will lead is a matter for careful thought, for it is unquestionably true that jurors are more often controlled by their judgment of the consequences to which a course of action will lead than by any other one thing. Jurors care little for consistency or for logic in comparison with consequences which seem to them to be evil, and they will be slow to follow any line that appears to them to lead to bad results, but quick to follow one that seems to lead to good results. They may not always take a just view of consequences; they do, indeed, often go astray in this particular, but they always keep a keen eye upon the probable consequences of a verdict. Nor do courts refuse to look to consequences. Thus, in one case it was said: "Let us test the principle now involved by a more extreme case than the one before us, but which will be *experimentum crucis*. If we can show that a principle logically carried out leads to an absurdity, it is conclusive against it."[36] Chief Justic Taney, in

[35] Bemis' Report of Professor Webster's Trial, 287, 288. It is said that Sir Charles Russell might have secured an acquittal in the Maybrick case if he had adopted and developed a different theory. Crispe's "Reminiscences of a K. C.," 101, 102. The danger of changing a theory is shown by Montagu Williams in his comments on Belt v. Lawes, 2 Reminiscences of Montagu Williams, 224.

[36] Palairet's Appeal, 67 Pa. St. 479, 5 Am. 450.

the course of one of his opinions, uses this language: "And what would be the results of this doctrine of implied contracts on the part of the states, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us?"[37] It is, indeed, one of the fundamental maxims of jurisprudence that, "An argument drawn from inconvenience is forcible in law."[38] Judge Holmes presses this principle very far, for he says: "The life of the law has not been logic, but has been experience."[39] If judges yield so much to experience, it cannot be doubted that it will sway jurors, who care little for abstract principles and less for precedents.

Jurors yield to their own experience rather than to the views of other men. They will often construct for themselves theories irrespective of the law as charged by the court. They will frequently be guided only by their experience in determining what the result of their verdict is likely to be, and they will reluctantly follow any other guide, if, indeed, they will follow it at all. This consideration is one that should control in no small degree the construction of the theory upon which counsel place the cause of their client. If the mental characteristics of the jurors can be ascertained in advance, it is prudent, as far as possible, to mold the theory to them; but as this can seldom be done, it is necessary to secure such a jury as will readily appreciate and adopt the theory constructed. By the term "experience" we do not mean actual knowledge derived from things really known to the jury, but knowledge resulting from their habits of thought and course of life. Archbishop Whately says of the word "experience": "The word, in its strict sense, applies to what has occurred within a person's own knowledge. Experience in this sense relates to the past alone. Thus it is that a man knows by experience what sufferings he has undergone in some disease.[40] More frequently

[37] Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773. See also, Lake Shore &c. Ry. Co. v. Cincinnati &c. Ry. Co., 116 Ind. 578, 19 N. E. 440.

[38] Broom's Legal Maxims, 139; Ram's Legal Judgments, 113; Illinois &c. Co. v. Fix, 53 Ill. 151.

[39] Common Law, 1.

[40] "How else," says Sir Arthur Helps, "is knowledge to be acquired, un-

the word is used to denote that judgment which is derived from experience in the primary sense, by reasoning from that in common with other data. Thus, a man may assert on the ground of experience, that he was cured of a disorder by such a medicine, that that medicine is generally beneficial in that disorder. It is in this sense only that experience can be applied to the future, or, which comes to the same thing, to any general fact, *e. g.*, when it is said that we know by experience that water exposed to a certain temperature will freeze."[41] It is on this experience that many of the distinctions and many of the rules of law are founded, and the verdicts of juries almost always based. Judge Holmes says: "The distinctions of the law are founded on experience, not on logic. It, therefore, does not make the dealings of men dependent on a mathematical certainty."[42]

It is possible that the learned author carries his doctrines somewhat too far, but it is undeniably true that experience is a chief factor in all legal contests. There are, indeed, many cases where the controversy is left almost entirely to be determined by the experience of the triers.[43] In matters of law, the experience which is to be accepted as the rule of conduct cannot be that of the individual judge, but it must be that found in the declarations of the legislature, the decisions of the courts, and the books of writers of acknowledged authority.[44] The earlier English judges were much more under the influence of Aristotle and his followers, the schoolmen, who narrowed his doctrines and dwarfed his principles, than the modern judges, and the consequence is that they often sacrificed substantial rights to subtle and senseless distinctions.[45] The law has been broadened and liberalized by the practical thinkers who have been influenced more by the

less by making men such as gods, enabling them to understand without experience?"

[41] Whately's Logic, Appendix V.

[42] Common Law, 312.

[43] Holmes' Common Law, 56, 147, 149, 152, 157, 158, 162.

[44] Mr. Maine clearly shows the evils of a system of jurisprudence composed of particular instances and destitute of fixed principles. Ancient Law, 76.

[45] De Laudibus Legum Anglæ, 7. note of Mr. Amos.

teachings of experience than by the formal logic of the schoolmen. But, after all, the experience which guides judges is, for the most, that transmitted to them from the past, and it is well that it is so, since men often imagine that they are taught by their experience when, in fact, they are influenced by very different causes. While this is true, yet an appeal to experience is almost always a strong one in forensic disputes.

The theory of a case should be clear and harmonious, for if there is obscurity and conflict it can neither be effectively developed nor strongly presented to the triers of the cause. Clearness is secured by a just method of arrangement, giving to each particular fact and principle of law the prominence which its importance merits, and preventing it from being obscured or hidden by other facts or principles. Facts must not be jumbled together in disorder, one left lying over in the way of another; nor must principles of law be thrown together in a mere huddle. The theory should be so arranged that the facts and principles may be marshaled in logical order, and their development be not unlike the march of a column of well-disciplined soldiers. A straggling, disjointed theory is as little likely to prevail as a force of stragglers matched against a body of disciplined troops. There are, as we have already suggested, two principal elements in all well-constructed theories, the law and the facts, and in the construction of the theory these must be kept separate, yet so arranged as to form parts of one harmonious system. The modes of trying questions of law and questions of fact are different, and the mode of presenting them is also essentially different, so that if they are jumbled together confusion is produced. Where there is confusion there is almost always weakness, although there are cases where some of the weak places may be concealed by confusing the surroundings; and there are other cases where the strong points of an adversary may be parried by obscuring them. It is, however, the safest general rule to keep the interdependent parts of law and facts from so blending as to prevent their clear perception and just use. If this is not done, then the theory will not be a safe one, and difficulties will be encountered at every important step

in the progress of the cause.[46] The confusion of matters of law with matters of fact interferes with the work of arraying and introducing evidence, makes it difficult to properly prepare instructions, and very greatly embrarrasses the advocate in presenting his case in argument. Cases, as the books show, are often lost by a failure to so separate the two elements of law and fact that the one can be clearly presented to the court, and the other to the jury. It is, indeed, not always easy to discriminate matters of law from matters of fact, but it is a work which must be done, and well done, or no adequate and sound theory can be constructed.

Presumptions are important factors in forensic contests, and the theory of the case cannot be well constructed without giving due weight and place to presumptions, both of law and of fact. Presumptions of law are, of course, of much wider sweep than presumptions of fact, and are, in effect, rules of law requiring that from particular facts particular inferences shall be made. These presumptions confine the inference to a designated conclusion, and neither the court nor the jury will be allowed to disregard them.[47]

It is not very difficult for one who has full knowledge of the facts, and an adequate acquaintance with the rules of evidence, to determine, in preparing his theory of the case, what presumptions of law he can employ to sustain his cause, and what may be employed against him. If the adverse presumption is one that cannot be rebutted, then, if the theory cannot be so framed as to avoid it, the case is hopeless. But many of the conclusive presumptions of law may be avoided by a skilfully constructed theory. If the presumption of law is rebuttable, then the better course is to make provision for rebutting it. There are, however, cases where a rebuttable presumption may be entirely avoided, and it is sometimes prudent to make provision both for avoiding

[46] Darling v. Westmoreland, 52 N. H. 401, 13 Am. 55, 63; Gray v. Jackson, 51 N. H. 9, 12 Am. 1.

[47] Best's Principles of Evidence, §§ 42-304; Justice v. Lang, 52 N. Y. 323. See also, Platt v. Elias, 186 N. Y. 374, 79 N. E. 1, 2, 116 Am. St. 558, 559; 1 Elliott Ev., §§ 79, 80.

it and for rebuting it by proving facts that make it ineffective. But where the combination of the two methods will probably produce material inconsistency, it is better to adopt a single method and strictly adhere to it, for inconsistency is an infirmity that greatly weakens a theory.

Presumptions of fact cannot always be fully anticipated, but, when anticipated, they are much more easily disposed of than presumptions of law. Presumptions of fact arise from facts, and are, in reality, mere inferences of fact naturally arising from proved or admitted facts. "Presumptions of fact," it was said in one case, "are but inferences from other facts and circumstances, and should be made upon the common principles of induction."[48] In another case it was said: "Presumptions of fact are at best but mere arguments, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments."[49] It is evident, therefore, that presumptions of fact cannot be fully perceived at the time the theory of the case is prepared. But by laying out in the mind the whole case, with its prominent features and its minute facts, one may be able to conjecture with a fair degree of certainty what presumptions of fact will arise, and he who does not do this work with scrupulous care will find many a jolt and shock, if, indeed, he does not fare worse, in developing the case. With the facts, and all the facts, the principal as well as the minor ones, fully and distinctly in his mind, one may look along the lines the case must traverse, and with much success conjecture what presumption will arise at this point and what at that; and if this work is thoroughly done, provision may be made for making good use of favorable presumptions, and for avoiding, weakening, or destroying those that are adverse. This work cannot be well done unless the man who undertakes it knows the materials he has at command, the grounds over which the contest will be waged, the difficulties he must encounter, and the opposition he will meet. Some of these things it is his

[48] O'Gara v. Eisenhour, 52 N. Y. 298. See also, Modern Woodmen v. Kinchloe (Ind.), 93 N. E. 452; City of Indianapolis v. Keeley, 167 Ind. 516, 527, 79 N. E. 499, 503; 1 Elliott Ev., §§ 81-83.

[49] Lanhorn v. Carter, 11 Bush (Ky.) 7.

own fault if he does not fully know. The force of the opposition he can only conjecture, but conjecture it he must as best he can. If he must err in this conjecture, the error will do no harm if it be one attributing too much strength to the enemy, but it may be a very serious one if the strength of the enemy is underrated.

Presumptions are of more weight than careless thinkers attribute to them.[50] He who can make the presumptions fight on his side, even if they are no more than presumptions of fact, is almost sure to be the victor. Cases are often lost and won on presumptions. Indeed, in many cases the contest is a battle of presumptions.[51] A theory that provides for creating presumptions, and arrays them in the strongest positions, is a strong one. It is strong because it well disposes of the forces at command; since in doing the work he who does it acquires a knowledge of the case, and knows the points of strength and weakness, knows where ambushes are to be expected and how they are to be avoided. In more ways than one is benefit derived from a close study of the presumptions which will arise as the case is unfolded. Thin spun theories will not do; there must be facts from which the presumptions naturally arise, as effect follows cause. But it is better to expend ingenuity in conjecturing what presumptions will arise, even though the conjectures be unsubstantial, than to construct a theory without looking along the line and endeavoring to conjecture what inferences may be drawn from the facts as they emerge from the evidence. It is well, however, not to permit a favorite hypothesis to become so dominant an influence as to exclude others, stronger and more probable, that come into view as the case progresses. Men often err in obstinately attempting to establish a favorite hypothesis.[52] Better sacrifice a favorite mental offspring than a client's cause.

[50] "We spend our lives," says Oliver Wendell Holmes, "in fighting against presumptions."

[51] Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357. See also, 1 Elliott Ev., § 88.

[52] The "Country Parson" (Boyd), in his essay on "Screws," says that most men have a "twist" in their mental makeup that causes them to cling to theories of their own even after their absurdity has been demonstrated,

The verification of the theory is the last work to be done prior to embodying it in the pleadings. This work demands sound judgment and close study. Every step should, if possible, be verified by an appeal to the facts, to the authorities and to reason. The theory will, in the progress of the trial, be rudely assailed, and if there be a weak spot in it, whether in the element of fact or of law, it will be exposed. It is a sound rule, insisted upon by all the writers upon advocacy or kindred subjects, never to underrate the power of your adversary. It is unsafe to leave a single part of the theory unverified. Things that appear strong at the first inspection are often found weak on a second investigation. Writers on rhetorical subjects inform us that what seems perfect when read while the mind is "warmed by the act of creating" seems weak and imperfect when examined after the mind has cooled. So it is of a theory; when the mind is warmed by the creative act no imperfections are discovered, but when this warmth has passed away the cool judgment detects and exposes many weak spots. Even when the mind has cooled it is not always easy for it to perceive the weak places in a thing of its own creation. Men cling to theories of their own invention long after others have perceived their utter unsoundness.

The advocate, of all men, needs to be careful to leave no vulnerable places; for the keen eyes of his adversary will leave no weak place undiscovered, and when discovered, then, be sure, a thrust will follow swift and strong. It is not to be forgotten that the advocate in constructing his theory is very likely to be deceived. But not so his adversary. He, least of all men, is likely to be misled, for he is the enemy of the theory, and all his powers are bent upon discovering the weak places. His work is that of destruction, not of construction.

Writers have again and again, as we have said, likened the contests of the forum to those of war. There is, as has been noted, a close resemblance, and it is not to be wondered that in

and Montaign, in his essay on "Vain Subtleties," calls attention to the same peculiarity in human nature. This is important not only in framing the theory but also in examining witnesses and arguing to the jury and leading jurors to adopt a favorable theory as their own.

the opinions and in the books we find terms taken from the art of war. Closely as the legal contest resembles those of military campaigns, it resembles a naval engagement even more closely. The theory of the case outlined in the pleadings is to the advocate as the ship to the sailors who "fight by sea." They may veer and tack, but they must do their fighting from their ships. So with the advocate; he must fight within his theory. At the risk of doing with our illustration what Choate said the constable did with the participle, we press it a little further, and liken a cranky and feeble theory to a leaky and unseaworthy craft.

There are in complex cases many points to be carried by assault, many weak places to be defended, and many posts to be fortified. The task of constructing a theory in such cases is intricate and difficult. This part of the advocate's work is very like that of a general planning a campaign; but in some respects it is even more difficult, for the reason that the theory must account for many things by showing their origin and developing their character. Like the general, the advocate must foresee and provide against the movements of his adversary; for that man will go far astray who looks alone to his own side and takes no thought of what his antagonist may do. It is not a contest or a campaign where only one side moves; nor will it do to take it for granted that the adverse counsel will pursue some old and often-tried tactics. One who rests upon such a supposition will most likely meet the fate which befell the Austrian generals who supposed that, as a matter of course, the young Frenchman would fight according to the ancient and well-known system.

The resemblance between the process of planning a campaign and constructing a theory extends to the work of the preparation and arrangement of details. Success demands that there should be "an almost ignominious attention to detail." Little things often do great mischief; a hole in the bottom of a ship may bring destruction as surely as if the vessel were torn plank from plank; the breaking of a diminutive bolt may stop the machinery of a great factory; the displacing of a spike may bring destruction to a railroad train and death to its passengers. The omission of a demand, the failure to give a notice, or the neglect to make some

formal proof, may bring irretrievable disaster. An omitted item, though easily obtained, may be fatal to success. One who walks through the patent office at Washington is struck with the great number of rejected models. Many of them—indeed, almost all of them—are striking specimens of mechanical skill and inventive genius, and perfect in every part except one, but that one ruins all. It is so of many theories; they are perfect in outline, but defective in detail. To the mind of the author they seem serviceable for actual work, but when put to the test they prove defective in some part. Their framers are not mindful of the rule that no part of a thing, such as a theory, is stronger than its weakest part. The fabric may be perfect in every part except one, but the one imperfection may shatter the whole when the collision comes. It is of little importance that a fortress be defended at every point save one, if the undefended point be sufficient to let in the assailants. This holds good of a theory of a case; for, no matter how many strong points it may have, it will serve no useful purpose if it has one weak place that will let in the assailants and compel a capitulation. It is the great purpose of the theory to lay out the road to be passed over to success, and to provide the means which will insure the victory. If there are gaps that cannot be crossed, or forces that cannot be brought into the conflict at the right time and place, the theory has not accomplished its purpose. If, as sometimes happens, the theory contemplates only what may be done after the conflict has ended, it will be of as little use as the tactics of the Knight of La Mancha.

Hostile criticism is, in every instance, to be expected. Positions must be laid down and entrenched with the knowledge that the strongest array of force, and the keenest weapons that hostile minds can secure, will be brought against them at every point.[53] The work of verification, therefore, needs to be thorough and searching. Judge Cooley, in his introduction to the edition of Blackstone's Commentaries edited by him, supplies an example of the close work that must be done in verifying a theory.[54] In

[53] "In determining the theory of the case, Rufus Choate was never satisfied until he had met every supposition that could be brought against it."

[54] Cooley's Blackstone, xvii.

the physical sciences each step is verified by experiment before a theory is accepted, and the study of the work of the philosophers who have devoted their time and talents to the discovery of physical laws and theories is an excellent discipline for the advocate.[55] He can, however, make no actual experiments; all that he can do is to refer his inferences and hypotheses to the test of what Cicero calls "reason in its intense and primitive purity." The way of a framer of a theory is so thickly beset with fallacies that nothing but unremitting care will prevent them from creeping into his mental fabric. One needs a mental microscope to detect them, and, since that cannot be obtained, its place must be supplied by the power of attention, directed with all the vigor the mind can master upon the work. The reports abound in examples of a fact or principle unduly assumed.[56] Examples of the fallacy of *non sequitur* are numerous.[57] The point in dispute is often mistaken.[58] The fallacy of confusion not infrequently leads the advocate astray.[59] Again and again advocates proceed in a circle, "and beg the question."[60]

A mistake is often made as to who has the burden of proof on a particular hypothesis or proposition.[61] Assuming that cases are analogous when they are not is a prolific source of error.[62] The investigator, as, indeed, the reasoner, in public is sometimes misled by assuming that the presumption is in his favor when it is against him; on the other hand, he if often at fault for not avail-

[55] Devey's Logic, 234; Bain's Logic, 297; Mill's Logic, 338.

[56] Cincinnati &c. R. Co. v. Carper, 112 Ind. 26, 34, 35, 13 N. E. 122, 14 N. E. 352; Cuff v. Newark &c. R. Co., 35 N. J. L. 17, 10 Am. 205, 209; Robbins v. Burn, 54 Ill. 48, 5 Am. 75, 80; Cooke v. Millard, 65 N. Y. 352, 22 Am. 619, 625.

[57] Commissioners v. Miller, 7 Kan. 479, 12 Am. 425, 454.

[58] Swank v. Hufnagle, 111 Ind. 453, 454, 12 N. E. 303, 13 N. E. 105; Theory of Thought, 276; Sidgwick Fallacies, 189.

[59] Austin's Jurisprudence, 72.

[60] Eaton v. Boston &c. Co., 51 N. H. 504, 12 Am. 147, 157; Fallacies, 196; Theory of Thought, 282.

[61] Fallacies (Sidgwick), 151. Theory of Thought, 279.

[62] Matter of Washington Avenue, 69 Pa. St. 352, 8 Am. 255, 261.

ing himself of a presumption in his favor.[63] In some instances the advocate is deceived by an appearance of similarity in the facts, when there is, in reality, an essential difference. In other cases he is deceived by an apparent difference where there is no real one, for, as Dr. Holmes says, "a great many things, we say, can be made to appear contradictory simply because they are partial views of a truth, and may often look unlike at the first, as the front view of a face and its profile often do."[64] Rival and conflicting hypotheses are sometimes accepted, and seldom without harm. Incomplete and inconclusive hypotheses not only destroy the symmetry and harmony of the theory, but they also make it so confused and obscure that it is not likely to accomplish any substantial results. They do, at all events, make the theory seem the work of a bungler, and thus they bring reproach upon its author. To such theories may be applied the words of Bunyan: "They go not uprightly, but all awry with their feet; one shoe goes inward and another outward, and their hosen out behind; there a rag and there a rent, to the disparagement of their Lord." It is only the good and perfect materials that should find entrance into the theory. The construction of a sound theory requires the highest powers of the human intellect. Mr. Donovan says, with truth and force: "The science of good practice is that art which teaches a builder to discard bad timber, to prepare what he uses with precise care, and fit it with precision to the members of the building; that teaches a mason to make joints before reaching the building he is erecting. The plan in the brain is the science of it all."[65]

A theory not well constructed may deprive its framer of advantages that a good theory would secure him, and impose upon him burdens that a good theory would relieve him from carrying. A theory not radically bad may still be weak, and by its weakness make uncertain that which by thought and care might be made certain. Verification will, if skillfully and thoughtfully con-

[63] Bates v. Prickett, 5 Ind. 22; Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357.

[64] The Professor at the Breakfast Table, 42.

[65] 22 Central Law Journal, 48.

ducted, expose the weak places, and enable the worker to strengthen them, and it will also enable him to make conspicuous the strong places. The theory, although not radically wrong—that is, wholly untenable—may still be defective in many respects; thus, it may be so constructed as to concede what might better be denied,[66] or to deny what might better be conceded; or it may needlessly put the burden of proof upon one party where with advantage it might be placed upon the other; or it may assume that it is necessary to prove much more than the law requires; or it may unnecessarily provide for matters of description, and lead to a fatal failure of proof, where there was no necessity for particularity of description. These hints are, we assume, sufficient to lead the framer of a theory to carefully work out and verify his theory before he subjects it to the blows and buffets of the trial. A verification may prove that, while his theory is not totally unsound, it is yet infirm, and this consideration a prudent worker will deem enough to make him push his verification much further than a mere inquiry as to whether it is in its general frame and outlines an available one. An advocate, although he may not totally mistake his remedy, may yet be greatly embarrassed by an infirm or overburdensome theory. Care and work—and work is, after all, the secret of success in advocacy—will be well repaid when bestowed upon the preparation of the theory. Be the theory good or bad, his work on the trial, and throughout all the case, will be controlled and limited by it, for the court, in most jurisdictions, will usually hold him to it with a firm hand.[67]

[66] Quinn v. People, 123 Ill. 333, 15 N. E. 46; Ohio &c. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279, 280.

[67] Louisville &c. R. Co. v. Woods, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Carver v. Carver, 97 Ind. 497, 516; Graham v. Nowlin, 54 Ind. 387; Quinn v. People, 123 Ill. 333, 15 N. E. 56; Ohio &c. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279, 280. See also, Roundtree v. Kansas City &c. Cement Co. (Mo. App.), 137 S. W. 1012; Morey v. Lake Superior &c. R. Co., 125 Wis. 148, 103 N. W. 271, 12 L. R. A. (N. S.) 221.

CHAPTER IV.

PRECAUTIONARY STEPS AND INCIDENTAL MATTERS.

"All light is valuable on a dark path."—*DeQuincey.*

"Above all, a perfect understanding of these points, in regard to which a false step taken in court may be ruinous, should be most anxiously sought after."—*Law Magazine.*

"The result of my professional experience is that he who thoroughly understands his case, and the law applicable to it, will always have the attention of the judges, and this is all the influence which the most eminent advocate can ever have in our courts."—*Nicholas Hill.*

No recovery is legally possible unless the cause of action is complete at the time the appeal to the judicial tribunal to enforce it is made by the party injured. Mr. Broom says: "In the first place, then, the party proposing to sue should satisfy himself that he has a cause of action against the defendant; for, at the trial, he will have to prove that a right of action was vested in him before he commenced his suit."[1] Acts performed after the action is commenced may be available as evidence, but they cannot constitute elements of the cause of action. The right of the plaintiff and the wrong of the defendant arise out of facts in existence when the action is begun. Whether the facts which constitute the right of which the plaintiff demands a vindication be of great

[1] Broom's Com., 111. See also, Brickey v. Irwin, 122 Ind. 51, 52, 23 N. E. 694. It is sometimes advisable, also, in order to make the proceedings effective or accomplish any substantial result, to take certain auxiliary steps, such as to obtain a writ of attachment or garnishment, or an injunction or the appointment of a receiver, and these remedies usually require quick action. So a *lis pendens* notice is sometimes required to be filed. These subjects are treated in outline in 1 Elliott's Gen. Pr., Ch. XI, but the statutes and decisions and text-books on these particular topics should be consulted.

or little importance, the general rule is that they must exist at the time the complaint or declaration on which issue is joined is filed.[2] The great facts which constitute the cause of action, no effort of the advocate can bring into existence, and he would dishonor himself and his profession by attempting to fabricate or procure evidence which should make it appear that they did exist. But there are minor facts, essential to a complete cause of action, which it is his duty to bring into existence. This duty he may justly perform by directing and advising his client, although he cannot with strict propriety perform the acts himself. For the most part these subordinate facts are such as are necessary to put the plaintiff entirely in the right and the defendant wholly in the wrong. Although these facts are minor ones, and merely supplement the main facts, yet unless they are brought into existence the advocate will be humiliated by an utter discomfiture, even though the principal facts of his client's cause of action are strong enough to repel all assaults.

There are many cases in which a demand is essential to the existence of a cause of action, and where it is necessary it must be considered as one of the minor facts of the case to be brought into existence before the action is commenced.[3] Thus, a demand is necessary in a case where personal property is purchased by the defendant in good faith from an agent or bailee;[4] so it is necessary in some actions for a breach of contract, and the failure to deliver goods or pay money;[5] again, it is necessary in actions to evict tenants;[6] and so, too, it is necessary in an action

[2] Read v. Buffum, 79 Cal. 77, 21 Pac. 555; Baker v. Tillman, 84 Ga. 401, 11 S. E. 355; Dean v. Metropolitan &c. R. Co., 119 N. Y. 540, 23 N. E. 1054. See also, Bynum v. Burke County Com'rs, 101 N. Car. 412, 8 S. E. 136; Gulf &c. R. Co. v. Settegast, 79 Tex. 256, 15 S. W. 228; Henderson v. Three Hundred Tons of Iron Ore, 38 Fed. 36.

[3] See 1 Elliott's Gen. Pr., § 313; 9 Am. & Eng. Ency. of Law (2d ed.) 197, *et seq.*

[4] Amos v. Sinnot, 4 Scam. (Ill.) 441; Thompson v. Shirley, 1 Esp. N. P. C. 31.

[5] Frazee v. McChord, 1 Ind. 224; High v. Board, 92 Ind. 580; Davis v. Doherty, 69 Ind. 11.

[6] Doe v. Wandlars, 7 T. R. 117; Jones v. Temple, 87 Va. 210, 12 S. E. 404.

by a principal against an agent for a failure to pay over money collected by the latter.[7] These are a few only of the many classes of cases in which a demand is an essential element of the right of action, but they will serve to warn the young advocate, and to remind, it may be, the veteran of his duty. Nor is the duty done by simply directing that a demand be made. The advocate is required in many cases to direct when, where, how and of whom it shall be made, for it must be made of the proper person,[8] at the right time and place,[9] and in a correct form.[10] Where the demand is required to be of a specific character, it is the duty of the advocate to prepare a form in writing, and not to trust to oral evidence. It is not often that anything more than a demand expressed in general terms is required, but there are cases where it must be of a specific character. Where the contract prescribes, either in direct terms or by implication, what the demand shall be, it is safest to make it in writing. Where there is doubt as to whether a formal demand is necessary, or as to whether it should be in writing, the advocate should take no risks, but should cause the demand to be specifically made in writing. Mr. Chitty cautions the attorney against making any admission in a demand, or other communication to the adverse party, and this caution should not go unheeded.[11]

Although it is a little aside from the subject now under immediate consideration, yet it may not be inappropriate to add a caution upon a kindred topic. Admissions should be sparingly made, and only after calm deliberation. It is unsafe to make them, no matter what their character, otherwise than in writing. Experienced attorneys strongly advise against making any except upon matters of minor importance,[12] but this advice hardly goes far

[7] Jones v. Gregg, 17 Ind. 84; Hon v. Hon, 70 Ind. 135; Heddens v. Younglove, 46 Ind. 212.

[8] Goodwin v. Wertheimer, 99 N. Y. 149, 1 N. E. 404; Whitsell v. Wells, 24 Pick. (Mass.) 29; Lill v. Russell, 22 Wis. 178.

[9] Bacon v. Western &c. Co., 53 Ind. 229.

[10] Van Rensselaer v. Jewett, 2 N. Y. 147.

[11] 1 Chitty Gen. Practice, 441; 2 *Id.* 56.

[12] Warren's Duties of Attorneys, 190; 3 Chitty Gen. Practice, 838. But Lincoln made many admissions as to matters not vital in trying cases.

enough, for, even though the matter has apparently little influence upon the merits of the case or the conduct of the trial, no admission should be made without full consideration; and when made should, if practicable, be written out in full.

A tender of money or goods is often required to make complete the cause of action, or make perfect the grounds of defense.[13] It is a fundamental maxim that he who asks equity must do equity, and under the operation of this rule a tender is very often necessary to complete the cause of action. Thus, where a tax sale is invalid, but the defendant has paid taxes chargeable against the property, the right of action is not complete until a tender has been made.[14] A tender is required in cases where a rescission of a contract is sought.[15] A suit for specific performance will fail in many cases unless a tender has preceded the suit.[16] In many cases there must be a tender of money in order to maintain an action for a breach of contract. The contract may sometimes require a tender where, but for the language of the instrument, none would be exacted.[17] Akin to the tender of money or goods is the offer to perform on the part of the plaintiff.[18]

A tender or offer of performance is often essential to a successful defense. It is sometimes available for the purpose of reducing the damages or costs, and then may be made after the action is brought. Where, however, it is relied on to defeat the claim for damages and costs it should be made before the plaintiff commences his suit.

There are many things which must concur to make a tender

[13] See Hunt on Law of Tender; 1 Elliott's Gen. Pr., § 317, *et seq;* 22 Am. & Eng. Ency. of Law (2d ed.) 1035; notes in 33 L. R. A. 231, 824; 43 L. R. A. 759; 8 L. R. A. (N. S.) 727; 12 Am. Dec. 573, 700; 77 Am. Dec. 470; 30 Am. St. 460.

[14] Lombard v. Antioch College, 60 Wis. 459, 19 N. W. 367; Belz v. Bird, 31 Kan. 139; City of Indianapolis v. Gilmore, 30 Ind. 414.

[15] Cain v. Guthrie, 8 Blackf. (Ind.) 409.

[16] Pomeroy's Eq. Juris., § 1407.

[17] McCulloch v. Dawson, 1 Ind. 413; Wagert v. Dickey, 17 Ohio 439, 49 Am. Dec. 467.

[18] 2 Wharton on Contracts, 970.

good. As a general rule it must be unconditional.[19] Where it is on a money demand it must be made in gold and silver, or in bills made by positive law a legal tender. It must be of the correct sum, and must be made at a time and place which will afford the party to whom it is made an opportunity for inspecting it.[20] It must be made at the proper time and at the proper place.[21] It must be made to the proper person.[22] It must be a continuous one, and kept good as a rule by bringing the money into court.[23] These are only a part of the requisites of offers of performance and tenders, but as it is foreign to the present purpose to do more than remind the advocate of some of the steps that must be taken as preparatory or precautionary measures, they are all that require mention. The mention of these matters is sufficient to impress upon the advocate the necessity of carefully instructing his client as to these preparatory steps, and as to the means of proof, and that is all that is here required.

There are cases in which a notice constitutes one of the minor facts essential to the existence of a complete cause of action. In some cases a guarantor is entitled to notice of the default of the principal.[24] Notice to a municipal corporation of a defect in a street, caused by the act of a wrong-doer, may be required to fix

[19] Berans v. Reese, 5 M. & W. 309; Buffum v. Buffum, 11 N. H. 45; Storey v. Krewson, 55 Ind. 397, 23 Am. 668; Henderson v. Cass County, 107 Mo. 50, 18 S. W. 992; notes in 22 Am. Dec. 223; 12 Am. Dec. 570, and 77 Am. Dec. 468, 476. But see Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. 435; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. 189; Wheelock v. Tanner, 39 N. Y. 481.

[20] 2 Wharton on Contracts, § 983. See also, Startup v. MacDonald, 6 Man. & G., 593, 624; Potts v. Plaisted, 30 Mich. 149; Croninger v. Crocker, 62 N. Y. 151.

[21] 2 Whart. Cont., § 990. See also, Wiggin v. Wiggin, 43 N. H. 561, 80 Am. Dec. 192; notes in 12 Am. Dec. 572; 77 Am. Dec. 468; Requisites of a Valid Tender, 17 Am. Law Reg. (N. S.) 745.

[22] King v. Finch, 60 Ind. 420; Kincaid v. School Dist., 11 Me. 188.

[23] 1 Chitty Gen. Practice, 505-509; Morrison v. Jacoby, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; note in 77 Am. Dec. 468, 482.

[24] Russell v. Clark. 7 Cranch (U. S.) 69, 3 L. ed. 459; Conner v. Higginson, 1 Mason (U. S.) 323; Allen v. Pike, 3 Cush. (Mass.) 238.

a right of recovery.[25] And notice of the injury in such cases, and, in some jurisdictions, of intention to sue, or the like, is made a condition precedent by many of the statutes.[26] In the important class of cases involving the rights of landlord and tenant, notice is often an indispensable fact.[27] In this class of cases the notice should be in writing and in proper form.[28] It must be given by the proper person to the person entitled to receive it.[29] It must be given at the proper time, and its service must be such as the law requires.[30] It is often the duty of the lawyer to advise his client to give notice in order to secure for him rights in a future action that he has reason to expect will be instituted. Thus, it is expedient for the counsel of a municipal corporation to give notice of the action brought against it for injuries caused by an obstruction in a street to the person who placed it there.[31] Substantial benefit may be secured by a grantee who holds under a deed with covenants of warranty by giving notice to his grantor of an action brought to evict him from the land.[32]

Notices are often required in order to prepare for trial by securing an inspection of documents in the hands of the adverse party. In order to secure this right the course prescribed by law must be carefully pursued.[33] It is never to be forgotten that "If

[25] Requa v. City, 45 N. Y. 129; Bassett v. City, 53 Mo. 290, 14 Am. 446.

[26] Touhey v. City of Decatur (Ind.), 93 N. E. 540, citing many cases from other jurisdictions. The subject is also considered and the earlier cases are cited in 2 Elliott on Roads and Streets (3d ed.), §§ 824, 826.

Notice to the wrongdoer to appear and defend, like "vouching in" a warrantor, is also important where the municipality has a remedy over, as the judgment against the city, if any, will then be made conclusive against him in several respects. 2 Elliott Roads and Streets (3d ed.), § 1170.

[27] Taylor on Landlord and Tenant, § 466; King v. Connolly, 44 Cal. 236.

[28] Johnson v. Huddlestone, 4 B. & C. 922.

[29] Wade on Notice, §§ 615-626; Taylor on Landlord and Tenant, § 481.

[30] Jones v. Marsh, 4 Term R. 464; Walker v. Shafer, 103 Mass. 154; 1 Chitty Gen. Prac., 483.

[31] Westfield v. Mayo, 122 Mass. 100; 2 Elliott on Roads and Streets (3d ed.), §§ 824, 826.

[32] Morgan v. Muldoon, 82 Ind. 347; Minor v. Clark, 15 Wend. (N. Y.) 425.

[33] 3 Chitty Gen. Pr., 434. For the practice, see 2 Elliott Ev., Chap LXVIII, § 1384, *et seq.* See also, 1 Thomp. Tr., § 730.

a case cannot be made out by legal evidence it cannot be made out at all."[34] It must be kept in mind, too, that courts will receive only the best evidence, unless a foundation has been properly laid for the introduction of secondary evidence. The efforts of counsel must, therefore, always be directed to obtaining the best evidence that the case in its nature affords; and, as all written instruments speak for themselves, they constitute the best evidence. When these documents are in the hands of the adverse party, notice to produce them must be given in order to let in secondary evidence. The notice must be framed with care, and should inform the party to whom it is addressed as to what is required, and, for this reason, the document should be accurately described.[35] If the documents are in the possession of a third person a subpœna *duces tecum* should be seasonably issued.[36] If the documents are lost, then proof of a diligent and an unsuccessful search in the proper place must be made in order to open the way for the introduction of secondary evidence.[37]

These are matters plain enough when mentioned, but they cannot be overlooked without involving the lawyer and his client in difficulties that cannot be surmounted. A neglect in performing the duty of ascertaining the facts, and the evidence by which they may be legally proved, will subject the advocate, not only to severe censure, but may cost him damages. It has more than once happened that words of stinging rebuke have fallen from great judges upon attorneys who have failed in their duty.[38] But it is not the fear of censure or of pecuniary loss that should influence the advocate; he should be moved by far higher motives to do his duty.

[34] Pulling on Attorneys, 191.

[35] 3 Chitty Gen. Pr., 834. Sometimes an order of court is required.

[36] See elaborate note in 128 Am. St. 755. See also as to *ad testificandum* clause not being absolutely essential, Wilson v. United States, 31 Sup. Ct. 538.

[37] Anglo-American &c. Co. v. Cannon, 31 Fed. 313; Simpson & Co. v. Dall, 3 Wall. (U. S.) 460, 18 L. ed. 265; Yavapai County v. O'Neil, 3 Ariz. 363, 29 Pac. 430; Thompson v. Thompson, 9 Ind. 323; Collar v. Collar, 86 Mich. 507, 49 N. W. 551, 13 L. R. A. 621; 1 Elliott Ev., § 212.

[38] Thwartes v. McPherson, 3 C. & P. 341; 2 Chitty Gen. Pr. 22, note.

Arrangements for trial involve the performance of various duties. These duties need not be performed by the advocate himself, but it is his duty to direct and control their performance. The time for trial must be fixed so that reasonable notice can be given parties and witnesses. If the personal attendance of witnesses cannot be enforced by the process of the court, depositions must be taken, and notices to take them must be prepared and served as the law requires.[39] The advocate should see to it that the proper method of examination is pursued in taking the testimony of the absent witnesses, and he cannot safely intrust the examination to a strange and uninstructed counsel. It is often necessary to examine in advance depositions taken by the adverse party, for the purpose of ascertaining whether there are valid objections to them, and it is always prudent to examine them for the purpose of gaining information of the adversary's line of action. If, from any cause, there is reason to fear that the testimony of a witness may be lost, his deposition, *de bene esse,* should be promptly secured.

Directions to issue subpœnas for witnesses must be given in time to secure due service. There is one safe rule on this point, and that is, give the directions in writing in every instance. Issue subpœnas in every case, and do not trust to the oral promises of witnesses that they will be in attendance. Provide the means of compelling attendance by causing proper process to be served, and the tender of fees to be made in cases where it is required. Where documents or papers in the hands of a witness are needed be sure that the subpœna fairly describes them. Write in full the names and residences of witnesses. Ascertain at the very earliest practicable moment what witnesses the adverse party will call, and obtain a knowledge of their business, their reputation and their character. If their reputation is vulnerable, prepare to assail it by witnesses; but, although this advice is somewhat aside from the present topic, keep in mind this one thing: do not make an

[39] As to manner and procedure in taking and using depositions, see 2 Elliott Ev., Chap. LIV; Ency. of Ev., Tit. "Depositions"; 9 Am. & Eng. Ency. of Law (2d ed.) 295; 13 Cyc. 822, *et seq.*

assault upon the reputation of any witness unless it is deserved, and your assault is strong enough to make a decided impression.

There are very few cases in which it is not important to ascertain the particulars of the claim against which the advocate is required to defend. Whether the claim is asserted by complaint or declaration, or by way of answer or counterclaim, it can be encountered with better hope of success if the particulars of it are known. A pleading dealing only in general terms may contain hidden places that, like the thickets of the forest, may serve as places of ambush. Where there is doubt or uncertainty the safe course is to clear the way by compelling, whenever it can be done, a display of all the particulars of the claim. This brings them into full view, and the contest is waged against a known force upon an open plain, and not in places where ambushes may be laid and new forces called into action. A fabricated claim will not often stand the test of specification. It is a sort of dissection that clears away the coloring and reveals the rottenness of the skeleton. If the statements of an adversary's pleading are vague and uncertain, the true course is to move to make them certain and specific. If the claim is one which can be particularized there should be a demand for a bill of particulars.

In setting forth the particulars of a claim it is impolitic to place too great a value upon the items. Cases have been laughed out of court by claims so large as to seem ridiculous. A fair and just estimate of the value of each item gives an honest appearance to the claim; while an extravagant estimate gives it an appearance of a fraudulent fabrication. Of course, the value may, and often should, somewhat exceed the amount likely to be proved, but the excess should not be very great. An honest claim, based on substantial facts, is not, as the jury will quickly see, likely to be an extravagant one. If the evidence falls far short of proving the amount claimed the jury will not be slow to conclude that the client who asks the enforcement of an exaggerated claim is, if not positively dishonest, so unscrupulous as to be entitled to scant favor. An exaggerated claim arouses a feeling of distrust that needs but a little thing to enlarge it into a feeling of resentment.

When the time for trial is close at hand listen again to your

client's story. Listen with patience, that no fact may escape you. Quintilian truly says: "There is not so much inconvenience in listening to superfluous matters as to be ignorant of such things as are necessary."[40] Patience was esteemed by the ancients as a necessary quality in an advocate. "And, indeed," as the French advocates teach, "why should not a person who sees his fortune or his honor in peril have a right to be heard in detail, so that nothing may be forgotten in the instructions?"[41] The veteran English attorney, Joseph Chitty, viewing the question with less of sentiment and more of cold business sagacity than the French and Roman advocates, insists, with almost equal earnestness, upon a consultation with the client when the time for trial closely approaches. This final consultation will, if the advocate is mindful of his duty, do more than refresh his memory. It will quicken his interest in his client's cause, and arouse his mental powers. If he be of the stuff of which great advocates are made, the near approach of the conflict will put a spirit into him that will give him strength to quit himself as a man, if it does not insure success. If, with the battle not "afar off," he hears his client's story coldly and with indifference, he is not well equipped for the encounter. Doubtless, the keen thrusts of the conflict will excite him to determined action, but, nevertheless, he will not be so strong as he would be if he had with zeal and spirit taken up arms for his client before the contest opened.

It is while the mind is warmed with the client's story, and stirred by the thought of the contest so soon to be fought in the forum, that the notes needed for the conduct of the trial should be put on paper. "There is," says M. Bautain, speaking of a kindred subject, "always life in this first rush, and care should be taken not to check its impetus or cool its ardor."[42] It is neither necessary nor expedient, however, to put down in full all the facts, much less the evidence; that work ought to be done at an earlier stage of the case. What is needed for use in the course of the trial is a collection of hints or suggestions.

[40] Quintilian Inst. Book XII, Chap. VIII.
[41] History of the French Bar, 160.
[42] Art of Extempore Speaking, 197.

Too much committed to writing will do harm. No man can go through a contest where every step must be watched with vigilance, every advantage seized and every danger guarded, with credit to himself or justice to his client, if he follows the written pages previously prepared. One who is embarrassed by his notes cannot thrust or parry like one whose mind is bent upon the movements of the contest. The paper needed for the purpose of conducting the trial is a mere skeleton. It is what M. Bautain calls "a dry bone frame." Each sentence must have a meaning, and must convey it quick as the flash of thought to its author. He must know without conscious effort what each proposition means. He must be able to determine the length and breadth of every statement even more rapidly and unerringly than the mind determines the size and distance of objects perceived by the eyes. The effort expended in catching the import of words contained in the skeleton of a brief is lost to the actual work of the contest. To the extent that the attention is absorbed by the written notes, to that extent is the advocate crippled. It will not do to take as models for the purpose of which we are speaking the briefs of English attorneys prepared for English barristers. It is wise to prepare such a brief after the preliminary examination, and in the preparation of such briefs the English authors are excellent instructors.

Much valuable advice is given by Mr. Chitty and Mr. Warren which the tyro can study with profit and the experienced advocate recur to with benefit.[48] But the brief prepared immediately after the preliminary examination should be laid aside when the trial opens. The brief needed for the trial, as compared to such as goes into the hands of the barristers, is as a fleshless skeleton to a body clothed in full flesh. The skeleton brief should contain the name of each witness, with a statement annexed to it suggesting in the shortest possible way the subject on which he will give testimony, and a statement, as short as it can be made and be intelligible, of the leading points of the case. It should be a condensation of the first brief, trimming it down to the very bones.

[48] Chitty's Gen. Pr., 847; Warren's Duties of Attorneys, 178.

The trial is the development of the theory. The facts should move before the jury in an orderly and an unbroken procession; not in a crowded and straggling mass. The line of movement should be such as to make it appear that facts follow facts and inferences emerge from inferences as if they were the natural sequence of what had gone before. Naturalness is secured by the art of the advocate in making each step follow in succession as the steps follow in the processes of nature. The work of the advocate resembles that of the artist who puts on canvas the pictures of a panorama. The canvas as it is unrolled exhibits the pictures which dwelt in the brain of the painter before his brush gave them visible form; so the theory of the advocate, as it is unfolded before the jury, gives visible form to the preconceived images of his brain. Their work is not unlike, differing chiefly in this: The painter's brush places his images before the physical vision, the advocate's work places them before the mental vision. Thus differing, they closely resemble in this: A deviation from naturalness blemishes and disfigures the work of both. The closer the line of natural movement can be followed, the stronger the presentation of the case. What enables the advocate to keep to this line is of benefit; what carries him from it is hurtful. If the written guide prepared for the trial is overloaded with particulars, branching from the main line into byways, it will do harm. If, however, it follows the line without confusion, and points out the way, it will do good. The great purpose of the skeleton brief is to keep the mind of the advocate to the line his theory has marked out as the way through the case. If the figure be not too bold, it may be said that his skeleton should be a chart to steer by, not a compendium of rules on navigation.

The testimony of a witness present in court, all other things being equal, unquestionably makes a much stronger impression than does testimony communicated in the form of a deposition. Sight and hearing combine, and the attention is much more thoroughly aroused than it is when the testimony is read from a paper. It is only where the attendance of an important witness cannot possibly be secured that his deposition should be substituted for his oral testimony. Testimony in the form of a deposi-

tion is competent in a proper case, and it would probably be error to instruct, as matter of law, that such testimony is of less weight than that delivered from the witness-stand by the witness himself; but, nevertheless, testimony in the form of a deposition, as experience abundantly proves, will not go so deep in the mind, nor remain so firmly in memory, as that which is given by the witness in the sight and hearing of the jury.[44]

In proof of this, if proof be needed, it is only necessary to instance the drama, for no one can doubt that the sight of the actors, as the play is developed on the stage, intensifies the power of the words they speak. Another reason why depositions should not be used when the presence of the witness can be secured is that many things are brought to mind, as the contest warms the mental powers to increased activity, and are seen to be important, which were either not thought of, or the importance of which was not perceived, when preparing interrogatories in the quiet of the office.[45]

Resources ought not only to be known, but to be at command, before the fight is on. A long look ahead, as long as sagacity and study will enable one to take, and a careful estimate of what is to be done and what is required to do it, are precautions which the prudent advocate never omits. The man who does not begin to be in earnest in his work until the trial is at hand will owe more to fortune than to merit if he is not soundly whipped.

[44] Carver v. Louthain, 38 Ind. 530; Millner v. Eglin, 64 Ind. 197; Voss v. Prier, 71 Ind. 128 (holding it improper to instruct that oral evidence is entitled to greater weight than depositions); Starkie's Ev. (Sharswood's ed.), 767; 3 Bacon's Abridg., 560; Institutes of Hindu Law, Chap. VIII; Ram on Facts, 38. See also, remarks of court in Pinson v. Atchison &c. R. Co., 54 Fed. 464, 465, as to advantages of having witness present, and observations as to the advantages and disadvantages of depositions in Anderson v. Ferguson-Bash Sheep Co., 12 Idaho 418, 86 Pac. 41; Hubbard v. Rankin, 71 Ill. 129, 131; Barron v. People, 1 N. Y. 386, 391; Baker's Will, 2 Redf. (N. Y.) 179, 192.

[45] "Questions and incidents of facts may arise on the trial which could not reasonably be anticipated by the party taking the deposition in advance, which could be successfully and truthfully met by the witness where present in court." Pinson v. Atchison &c R. Co., 54 Fed. 464, 465.

No great result can surely be accomplished if precautionary measures are not taken in good season. As much care is required in precautionary measures, although neither so much ability nor so much work is required, as in conducting the trial. The advocate must be both quartermaster and general, for he must secure the materials of forensic warfare as well as make them weapons of attack or defense. If he has guns without cartridges or proper ammunition he might as well have none at all.

CHAPTER V.

CHOOSING THE FORUM, REMEDY, AND METHOD OF TRIAL.

"As for responsibility, a judge, being a permanent officer, especially a judge sitting alone, is more responsible to public opinion than any individual juryman, who is one of a body assembled only once and immediately dissolved. But I believe that the feeling of moral responsibility is much stronger in the case of the juryman, to whom the situation is new, whose attention is excited, who for the first time in his life is called upon to exercise public functions in the face of all his neighbors, than in that of a judge who is, perhaps, doing to-day what he has been doing every day for ten years before."—*Sir W. Erle.*

"When we meet such opponents of the jury system we always ask them two questions: First, how many wrong verdicts can they recall; and, second, what they propose as a substitute."—*Irving Browne.*

"If the lawyer thinks the cause good in law and justice, he will prefer to have it tried by the judge."—*American Law Record.*

The advocate cannot always choose the forum for the trial of his case, but he may often so construct his theory and frame his pleadings as to determine whether the case shall be tried by the court or by the jury. In most jurisdictions a suit in equity is heard by the court without a jury, and almost all actions at law may be tried either by the court or by the jury, as the parties may elect. An advocate who determines that it is expedient to try by the court, and avoid a jury trial, will, whenever it is practicable, so frame his pleadings as to constitute his cause one of equity jurisdiction. It is, as all lawyers know, not possible to do this in every case; nor, indeed, in many cases; but it may be done in some. Thus, a plaintiff may often elect to bring an action for damages for a breach of contract, or he may institute a suit for specific performance.[1] Notwithstanding the changes made by the

[1] See Snodgrass v. Snodgrass, 32 Ind. 406; Dotron v. Bailey, 76 Ind. 434;

codes of civil procedure adopted in many of the states, there is in most of them still an election between remedies. An advocate may very often elect which remedy he will pursue, and when he does elect, he will, of course, make the theory and the pleadings conform to the rules which govern the class of cases in which he has elected to place the case entrusted to him.

A mistake in the choice of remedies may, in some instances, bring certain defeat, and in all it is very apt to endanger success. The selection of a radically wrong remedy insures defeat, and even if a remedy is chosen that is not radically wrong it may, if the best is not chosen, seriously embarrass and impede the advocate in his work. The choice of remedies is not, therefore, governed solely by the consideration of whether it is the proper one, for the question whether it is the best one, must also be considered. The same facts may bring success under one form of procedure, or in one forum, and defeat in another. Thus, a suit for injunction will fail if brought to enjoin the defendant from committing a fugitive trespass, but an action at law will lie.[2] An action to recover damages for a breach of contract may lie where an action for a breach of warranty would fail. An action for damages for trespass to land brought in one county may fail, but succeed if brought in another. An action may be maintained in one court, but, although the facts may be the same, not in another; for one court may have jurisdiction and the others not. There may sometimes be concurrent jurisdiction, and one judge may be preferable to another. So, too, it is sometimes possible to select the venue for trial by a judicious naming of parties, or a selection of the form of the remedy. There are cases where much depends upon the form of the remedy, the court, and the

Graves v. White, 87 N. Y. 463, 465; Smyth v. Sturges, 108 N. Y. 495, 15 N. E. 544.

See also for other illustrations, Frisch v. Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144, and note; Madison River Live Stock Co. v. Osler, 39 Mont. 244, 102 Pac. 325, 133 Am. St. 558, and note. *In re* National Cash Register Co., 174 Fed. 579, 98 C. C. A. 425.

[2] Bolster v. Catterlin, 10 Ind. 117; Frink v. Stewart, 94 N. Car. 484; Smith v. Gardner, 12 Ore. 221, 6 Pac. 771, 53 Am. 342, and note.

place of trial, and these are matters not to be lightly disregarded.

The same facts differently pleaded may lead to different results. Thus, a suit to foreclose may be maintained on a deed absolute on its face but executed to secure a debt, for it may be treated as a mortgage; but it would not support an action of ejectment nor a suit to quiet title. In a reported case the facts, shortly stated, were these: The defendants were the owners of a sow which went upon the plaintiff's land and injured his cow. The plaintiff, instead of laying as his cause of action, as he might have done, the trespass of the sow, and charging the injury to the cow in aggravation of damages, sued for the injury done by the sow and lost his case, because he did not prove that the defendants had knowledge of the vicious propensities of the sow.[3] In another case the defendant, an infant, hired a horse, and so ill-treated it that it died, and the plaintiff, instead of declaring on the tort, sued to recover damages for a breach of the implied contract to take reasonable care of the horse, and was defeated.[4]

Even in those jurisdictions where the code practice prevails there may be an action on the tort or on the implied contract, at the election of the plaintiff.[5] It is sometimes difficult to determine whether it is expedient to waive the tort and sue on the contract, or to ground the action on the tort, for the election may, in a great degree, control the method of trial, and materially affect the rights of the parties under the judgment recovered. A wrong decision of this question may lead to evil results, and once made the party cannot retrace his steps, but must abide by his decision. It is clear that, in general, an action on the contract will be simpler and require less evidence, but the damages

[3] Van Lewen v. Lyke, 1 N. Y. 515.

[4] Campbell v. Stokes, 2 Wend. (N. Y.) 137. See also, McLaughlin v. Dunn, 45 Mo. App. 645.

[5] Adams v. Sage, 28 N. Y. 203; Wilmot v. Richardson, 2 Keys (N. Y.) 579; Bixbie v. Ward, 24 N. Y. 607; Union Bank v. Mott, 27 N. Y. 633; Pomeroy's Remedies, §§ 568, 569. See also note in 134 Am. St. 186.

may not be so great nor the judgment so effective. It is sometimes easier to secure a verdict in an action for fraudulent representations than in an action on the implied contract, for evidence of fraud will sometimes strongly influence the jury against the defendant. A complaint charging fraud will, as is well known, often let in much evidence that would not be relevant in an action on the implied contract. On the other hand, it is sometimes more difficult to obtain a verdict where it can only be gained by attributing to the unsuccessful party a moral wrong than it is where he is simply charged with having failed to perform his contract. What course is expedient in such a case can only be determined from a careful survey and study of the facts, and a consideration of the character of the party against whom fraud is alleged. If a man's character is bad, jurors will not be slow to believe him guilty of fraud; if good, they will be extremely reluctant to impute dishonesty to him.

In other cases the nature of the relief will exert an important influence upon the choice of the form of the remedy. For example, personal property is sold upon the condition that it shall be paid for in cash, and possession is obtained without a performance of the condition. There is in such a case a choice of remedies, for the seller may either sue for the value of the property, or he may bring an action to recover possession of it.[6] If the sale is an advantageous one, and the purchaser solvent, it would probably be expedient to sue for the value of the property; but if he is insolvent, then the better course would be not to sue on the implied contract, but to recover the property. In the one instance it would be much easier to make out the case, but the judgment when obtained might be of no practical value. So, the effect of the statute of limitations, whether it is advisable to defeat an anticipated set-off, whether the defendant may claim an exemption if the action is *ex contractu*, and like considerations, are often important in determining the election of remedies or theory of the case in the beginning. It is evident that the matter of the

[6] Morris v. Rexford, 18 N. Y. 552. See also Madison River Livestock Co. v. Osler, 39 Mont. 244, 102 Pac. 325, 133 Am. St. 558, and note; Frisch v. Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144, and note.

election of remedies is one requiring care and judgment; but it is further evident that, after all, the question runs back to the formation of the theory, for the theory necessarily determines the form of the action, and what is here said does little more than show the application of the rules heretofore stated to particular instances. It is not our purpose, nor is it within the scope of our work, to discuss the rules which govern the election of remedies, or the methods of procedure, for all that our purpose requires is a mere suggestion of the necessity of studying with care, and deciding with caution, upon the choice of remedies.[7]

[7] The subject is more fully considered in 1 Elliott's Gen. Pr., § 272, *et seq.* See also, Bryant's Code Pl., 115-121; Bliss Code Pl., § 19. In this connection it may be well to quote some considerations stated by Mr. Munson in his Manual of Elementary Practice, 240, based on suggestions by Mr. Chitty: *"For the Plaintiff:* 1. What was the right affected? Was it public or private? If private, was it legal or equitable, vested in the party complaining, or in his trustee? Absolute or relative; in possession, remainder, or reversion? Depending on any and what contract, or without contract? 2. Was the injury private or public, civil or criminal, a tort or a breach of contract? If the former, was it with or without force, immediate or consequential, a nonfeasance, misfeasance, or non-malfeasance? 3. What are the several remedies, whether by any and what prevention or removal of the expected injury by the party himself; or the interference of an inferior or superior tribunal; or by enforcing specific performance; or compensation by some legal proceeding? 4. What, if any, precaution should be taken to prevent the possibility of even remote injury from, or litigation with any unknown party? 5. Supposing an injury has been threatened or is expected from a particular individual, then is it necessary to take any and what preliminary steps, as to make a demand, before the commencement of any hostile measures? 6. Can the injury be legally prevented or removed by any and what proceedings of the party complaining, or by and what relation or agent, and without the intervention of any constituted authority? 7. Can the injury be prevented by application to any and what constituted authority, and by what proceedings? 8. Suppose that the injury has been completed by some person, has it been barred by any and what statute of limitation, or any presumption of payment, etc.? Is there any mode of preventing such bar; and if not, then is there any criminal remedy for the same injury? 9. Is there any and what mode of ascertaining who in particular was the wrongdoer, as by letter or bill of discovery? 10. Is the complainant the

Where the action is at law, then, as a general rule, either party may of right demand a jury. Of the existence of this right there is seldom doubt, but as to when it is expedient to exercise it there is much doubt. It is not easy for the advocate, with the case fully before him, to decide whether a jury shall come or not, and it is more difficult to give advice upon the abstract question. Some general rules, proved by the experience of great advocates, may, however, be given, and from these the thinker will deduce the

proper party to assert the claim, or under any disability; and is the wrongdoer liable to be proceeded against, or privileged, or protected? 11. Is it fit to accept an apology, or to compromise, or to give any and what indulgence, etc., without previous suit? 12. Is any other step necessary before the commencement of legal proceedings, as giving notice, etc.? 13. Can specific relief or performance be enforced, either at law by mandamus, replevin, or summary proceedings; or in equity, by bill for specific performance? 14. Is it compulsory or advisable to refer to arbitration, and on what terms? 15. Is the complainant in possession of sufficient evidence to support his claim, and if not, how can he obtain it? If not, then how far should that circumstance influence in the choice or abandonment of remedies? 16. Before what tribunal, or what court, inferior or superior (federal or state), should the complaint be preferred? 17. By and against whom, or in whose name, should the proceedings be carried on? 18. What should be the first process, and should the wrongdoer be summoned, or taken on a capias? 19. What are the pleadings or statements of the complainant's case, whether at law or in equity, and under what mode of procedure? Is any further statement of facts required for preparing the pleadings? *On Behalf of the Defendant:* 1. Has the proceeding been commenced in the proper court; and if not, then can the defendant stop it by a plea to the jurisdiction, or otherwise? 2. If there be several claimants in adverse rights, should the defendant apply for an interpleader; and under what procedure may he adopt that course? 3. Otherwise, what is the proper defense, plea, or answer to the complaint? 4. What should be the subsequent pleadings and proceedings? *For Both Parties:* 1. What evidence should be adduced for the plaintiff and defendant? Must any of it be taken by depositions, or on commission? Is a view necessary? 2. What should be the conduct of the parties toward each other, and their relations touching the case, pending the litigation? 3. What should be the verdict, judgment or decree, award or adjudication? Whether specially or generally, and for any and what debts and damages?"

conclusion of what it is expedient to do in his own particular case.

Where the case is one not strong in its facts, but appealing to the sympathies of men, then let a jury come.[8] Judges are much less apt to yield to sympathy, for, although they may be moved, yet duty holds sympathy in check. Jurors, not bound by a stern sense of duty, yield, where there is a fair appearance of excuse, to their emotions. They will, indeed, search for an excuse, and it will go hard with them if they do not find one. As jurors are liable to err on the one side, judges are liable to err on the other side, through fear of sacrificing duty to sympathy. It is unnecessary to specify the cases which fall under this rule, for they will readily occur to every one who gives the subject any thought.

If the case is really a strong one, although somewhat obscured, then try by the court by all means,[9] unless some countervailing facts make a different course expedient. A judge will brush aside obscurities that would perplex jurors, and he will trim down all immaterial matters, and go at once to the strong points. Where the case relates to matters generally known to jurors because of their business or associations in life, then a jury trial is expedient, unless the knowledge or the prejudices of the jurors will probably be adverse to the client the advocate represents. In many matters the knowledge of jurors is better and more practical than that of the judge, and that knowledge should be made available whenever possible. Jurors are less restricted by rules than judges are, and will often render a verdict in accordance with what they esteem justice, while the judge, bound by duty, would deal out the stern law. Jurors love what they call justice, and although it is often "a wild kind of justice," still it is a kind that may be frequently pressed into service.

If a really strong advocate is on the other side, or one who has great influence with the jury, whether that influence be attributable to ability, or to some other cause, a jury trial should,

[8] 31 Alb. L. J. 504.

[9] "If the lawyer thinks the cause good in law and justice," says a writer in the American Law Record, "he will prefer to have it tried by the judge."

if possible, be avoided. If the case is one where the technical rules are one way, and operate with seeming harshness, then, as any one will see, a jury is wanted by one side but not by the other. A party who has a bad witness on his side that he must call is safer in the hands of the court than in the hands of the jury, for the trained mind of the judge will enable him to see that a bad witness does not taint the others, whereas a jury is almost sure to judge the other witnesses by the company they are found in.

Where liberal damages are wanted and expected a jury is needed. Judges are likely to award damages as compensation, or in the nature of compensation, whereas juries are almost sure to give liberal compensation, and to add something for sympathy, and still more by way of punishment. There are many cases where there is no definite rule for measuring damages, and in such cases, if sympathy is aroused, jurors will deal out compensation unsparingly, and will not stop with that. Especially will they liberally award damages where one side is powerful and the other weak. A weak woman is almost sure to be dealt with very liberally if a man be the adverse party. Every one, lawyer or layman, knows how great corporations fare.

Where the policy of the party is to compel the judge to fully state the law, it is well to take a jury and ask the judge to instruct in writing. This course is expedient where there has been an adverse ruling on the pleadings, and an appeal is in view. But, while it is always advisable to save questions, the true course is to fight to win in the trial court. That should be the chief purpose, although it is prudent to prepare for an appeal by saving questions. This purpose, however, should, we may say at the expense of a slight digression, be veiled and not revealed to the jury.

Jurors come to the consideration of a case with fresh and unoccupied minds, and the case placed before them is heard with eager interest; whereas, the judge almost always has many other cases in his mind, and the new case cannot receive his undivided attention. Nor is he called to do work novel or strange; but on the contrary, the work is commonplace and

familiar, unless, indeed, the case is a peculiar and striking one. For these reasons the judgment of twelve jurors on a question of fact is often really better than that of the judge. This, however, is true only where the jurors are men of average intelligence, who have not tried many cases, for of all bad triers, professional jurors are the worst. The things we have suggested merit consideration by one who is deliberating upon the question whether he will try his case by the court or by the jury.

Another matter that deserves attention is this: a prompt decision is generally obtained from a jury, while many judges delay their decisions. Two evils result from these delays; one is that the case is often postponed until the facts are forgotten or indistinctly remembered, and the case is decided on blurred and indistinct impressions; the other is that long delay makes it very difficult to secure a full and accurate bill of exceptions. Another reason for trying by the jury is that there are, it must with reluctance be owned, some trial judges who so strongly adhere to what they have decided that they will do injustice by denying a fair bill of exceptions in order to prevent their decisions from being overthrown on appeal. There are, happily, very few such judges, but the advocate who is so unfortunate as to be compelled to practice before such a judge will do well to trust the jury. It is said by an eminent man,[10] and, indeed, it has been said by more than one man, that some judges are influenced by particular advocates. Where this is true, of course the advocate who opposes one who controls the judge will try by the jury and not by the court.

[10] Sir W. Erle

BOOK II

THE WORK IN COURT

THE WORK IN COURT

CHAPTER I.

CONTINUANCE.

"No crime is so great, no proceedings so instantaneous, but that upon sufficient grounds, the trial may be put off."—*Lord Mansfield in King v. D'Eon*, 1 *Bla.* 509, 514.

Practical Suggestions.

The most successful advocate, as a general rule, is he who is equipped by thorough preparation to try his cause when it is called. There are, however, cases where a speedy trial is not desirable. A defendant in a criminal prosecution generally profits by delay. This is peculiarly true in cases where the crime has aroused indignation and there is a popular clamor for conviction. Violent emotions are calmed and quieted by time. Prosecutors who know their duty will bring to trial those accused of crime with as little delay as possible, while the advocate of the accused in most cases will secure, if he can justly do so, as much delay for his client as the law awards. Of course, no honorable advocate will, although he will fearlessly do his duty, unmoved by the clamors of press or people, resort to unfair measures to secure delay, still he will avail himself of all that the law allows. There are civil actions where delay is desirable, but it is better, in the majority of cases, to try the cause on the day appointed. No rule of general application can here be stated that will be of practical utility, for whether a civil cause shall be promptly tried or be postponed depends, in no small measure, upon the nature of the particular case.

The advocate who habitually seeks continuances is generally a very careless one, or else a very timid one. In either case he is not of the kind that wins success. If he does not feel strong in himself and in his cause, the chances are very largely against him. The advocate who shrinks from the contest and seeks temporary shelter in delay will, in the end, become so cowardly that he can neither serve his client well nor acquit himself with credit. For this reason, if for no other, the true course is to look difficulties fully in the face, resolve to encounter and overcome them, and to do it on the day fixed for the contest. It is neither wise nor expedient to seek delay in order to avoid the shock of the trial. A better and sounder reason than this should be present in the mind of the advocate when he resolves to ask a continuance.[1]

A courageous course, although generally the best, does not imply that unnecessary risks shall be taken. Caution is as important as courage. It is only the foolhardy, not the wise, who assume the hazard of trying a cause without ample time for preparation, or who risk a trial where important evidence that delay may secure is absent. Prudence requires that no risks be assumed where diligence and care can avoid them. Where there is a risk that a postponement will avoid, and there is reason for a postponement, then it is the part of wisdom and prudence to apply for a continuance.

Where the opposite party at the last moment files additional pleadings, or amends those previously filed, a postponement should be asked unless the advocate feels confident that he is well prepared to meet the new issue tendered, or the changes made in the issues by the amendments. Where changes are made in the issues it is necessary to fully understand their scope and effect before going into the trial. There are, to be sure, formal and immaterial amendments which do not substantially change the issues, and in such cases there is no necessity for a postponement of the trial; but it is never safe to assume, without study, that the changes are merely formal or immaterial.

[1] Judge Williams emphatically advises against delay and continuances under ordinary circumstances. Williams' Legal Ethics, 119, 120.

An application for a continuance must strictly conform to the law, for such applications are not viewed with favor, and little grace is accorded them. In every respect the affidavit should meet the requirements of the law, for the rule is that amendments cannot be made. It is bad policy to ask many continuances. It is so for the reason already suggested, and for the additional reason that the counsel who is habitually unprepared for trial soon loses favor with the courts, and although in a particular case he may have a meritorious cause for continuance, the court will regard his application with suspicion. A Fabian policy does not win the favor of courts. Another reason why an application for a continuance should be prepared with scrupulous care is that, in the event of a denial, a strong case can be made on appeal, for it is only where a strong case is made that the appellate court will review the ruling of the trial court.

RULES OF LAW.

1. Applications for continuance are addressed to the sound discretion of the trial court, except as otherwise provided by statute in a very few jurisdictions, and, unless it appears that injustice has been done, the rulings of that court will not be disturbed on appeal.

Belck v. Belck, 97 Ind. 73; Valle v. Picton, 91 Mo. 207, 3 S. W. 860; and see authorities cited in note to Stevenson v. Sherwood, 74 Am. Dec. 140; also 2 Elliott's Gen. Pr., § 481. But it is held that one accused of crime cannot be forced into trial in violation of the constitution where his witnesses are absent. Cremeans v. Commonwealth, 104 Va. 860, 52 S. E. 362, 2 L. R. A. (N. S.) 721 (refusing, however, to reverse conviction because it appeared that there were no such witnesses).

2. The party seeking a continuance must show good cause therefor.

3 Bouv. Inst., § 3036, and authorities cited under the following rules; also 2 Elliott's Gen. Pr., § 482.

3. Mere absence of a party, without showing good cause therefor, will not entitle him to a continuance.

Gates v. Hamilton, 12 Iowa 50; Wilkinson v. Parrott, 32 Cal. 102; Cohn v. Brownstone, 93 Cal. 362, 28 Pac. 953; Burkhart *et ux.* v. Merry, 88 Ind. 438; State v. Ellvin, 51 Kan. 784, 33 Pac. 547.

A belief, founded upon a rumor, of the illness of the judge, is not sufficient cause for the absence of a party to entitle him to a continuance. Yates *et al.* v. Mullen, 23 Ind. 562. Nor is the advice of an attorney that the cause would not be reached. Brock v. South &c. R. Co., 65 Ala. 79; Brandt v. McDowell, 52 Iowa 230, 2 N. W. 1100.

4. Mere absence of counsel without sufficient excuse is not ground for continuance as matter of right.

Horshaw v. Cook, 16 Ga. 526; Kern Valley Bank v. Chester, 55 Cal. 49; Hagerty's Ex'rs v. Scott, 10 Tex. 525.

Absence of counsel on account of sudden illness of himself or a member of his family may justify a continuance. Eslinger v. East, 100 Ind. 434; Thompson v. Thornton, 41 Cal. 626; Rice v. Melendy, 36 Iowa 166; Warren v. Nunez, 3 La. Ann. 54. But see as to what must be shown in such a case, Board v. Brown, 4 Ind. App. 288, 30 N. E. 925.

Engagement of counsel in the trial of another case may or may not entitle his client to a continuance. Where the circumstances are such that a party would be greatly injured by failure to postpone, and both he and his counsel are without fault, and other counsel cannot be obtained, or could not prepare to do justice to the case within the time allowed, or the like, the refusal of the application would be error. Hill v. Clark, 51 Ga. 122; Rossett v. Gardner, 3 W. Va. 531. But ordinarily, as where several continuances have already been had for the same cause, or the party is represented by other counsel, or the like, application should be refused. Richards v. Des Moines &c. R. R., 18 Iowa 259; Stockley v. Goodwin, 78 Ill. 127; Darley v. Thomas, 41 Ga. 524; Evansville &c Co. v. Hawkins, 111 Ind. 549, 13 N. E. 63; Smith v. State, 132 Ind. 145, 31 N. E. 807.

Absence of counsel on other business is generally not sufficient cause for postponement. Sharman v. Morton, 31 Ga. 34; Jackson v. Wakeman, 2 Cow. (N. Y.) 578.

5. Lack of preparation will not entitle a party to a continuance

where he might have been prepared if he had used due care and diligence.

Foster v. Abbott, 1 Mass. 234; Springer v. Mendenhall, 3 Harr. (Del.), 381; Pardridge v. Wing, 75 Ill. 236; Harvey v. Coffin, 5 Blackf. (Ind.) 566; Ballard v. State, 31 Fla. 266, 12 So. 865.

But in Cornogg v. Abraham, 1 Yeates (Pa.) 18, a continuance was held proper where the party was not prepared because of declarations of his adversary leading him to expect a compromise. See also, Cherokee &c. Co. v. Wilson, 47 Kan. 460, 28 Pac. 178.

6. Amendment of a pleading in matter of substance will entitle the adverse party to a continuance, at least where it works surprise.

Covell v. Marks, 1 Seam. (Ill.) 525; Ewing v. French, 1 Blackf. (Ind.) 170; Garlick v. City of Pella, 53 Ia. 646, 6 N. W. 3; Tourtelot v. Tourtelot, 4 Mass. 506; Turnstall v. Hamilton, 8 Mo. 500.

But a continuance will not be granted because of an immaterial amendment. Richards v. Nixon, 20 Pa. St. 19; Nimmon v. Worthington, 1 Ind. 376; Scott v. Cromwell, Breese (Ill.) 7. It has been so held where an amendment was allowed in order to make the pleading conform to the evidence. Wabash R. Co. v. Campbell, 219 Ill. 312, 76 N. E. 346, 3 L. R. A. (N. S.) 1092.

7. Newly discovered evidence, not known in time to be produced at the trial, may be good ground for continuance.

Berry v. Metzler, 7 Cal. 418; Allcorn v. Rafferty, 4 J. J. Marsh. (Ky.) 220; Cahill v. Dawson, 1 Fost. & F. 291.

8. Absence of a material witness may, upon a proper showing, be good cause for a continuance; but at least three elements must be present to make such a case: (1) The evidence must be material; (2) Due diligence must have been used to obtain it; and (3) It must be probably procurable and capable of being produced at the time to which the continuance is asked.

Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; State v. Duffy, 39 La. 419, 2 So. 184; Rowland v. Shepherd, 27 Neb. 494, 43 N. W. 344; Rex v. D'Eon, 3 Burr. 1513, 1515.

Additional requisites are sometimes prescribed by statute, and if there

happens to be such a statute in force in the jurisdiction where the application is made, it must, of course, be followed. This rule is also applicable to documentary evidence. See generally the elaborate note in 122 Am. St. 745, *et seq.*

9. The application for continuance must be made upon affidavit.

Thompson v. Miss. &c. Ins. Co., 2 La. 228, 22 Am. Dec. 129; Ralston v. Lothain, 18 Ind. 303. And in due time; so that if there is a rule of court reasonably fixing the time the continuance may be refused unless a good excuse for not complying with the rule is shown. Bernhamer v. State, 123 Ind. 577, 24 N. E. 509; Faulkner v. Territory, 6 N. Mex. 464, 30 Pac. 905.

10. The affidavit may be made, in the absence of any statutory requirement, by the party,[1] his attorney,[2] or, it seems, by any one in his behalf.[3]

[1] See note to Stevenson v. Sherwood, 74 Am. Dec. 140.

[2] Seers v. Grandy, 1 Johns. (N. Y.) 574; Robinson v. Martel, 11 Tex. 149.

[3] Guyer v. Cox, 1 Overt. (Tenn.) 184; Wheaton v. Cross, 2 Hayw. (N. Car.) 154; Lockhart v. Wolfe, 82 Ill. 37. But see Sullivan v. Magill, 1 H. Blk. 637.

11. The affidavit should be construed most strongly against the applicant, no presumptions being indulged in his favor.

Owens v. Starr, 2 Litt. (Ky.) 230; Van Brown v. State, 34 Tex. 186; Brady v. Malone, 4 Iowa 146; Turner v. Eustis, 8 Ark. 119.

12. Where a continuance is sought on the ground of the absence of a material witness, or, in fact, on almost any ground, the affidavit must clearly show that due diligence was used to obtain such evidence, or to be ready for trial in other respects, as the case may be.

Ilett v. Collins, 102 Ill. 402; Thompson v. Miss. &c. Ins. Co., 2 La. 228, 22 Am. Dec. 129; Watson v. Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353; McKinsey v. McKee, 109 Ind. 209, 9 N. E. 771.

The facts constituting such diligence should be specifically set out

that the court may judge of their sufficiency. Kilmer v. St. Louis &c. Ry. Co., 37 Kan. 84, 14 Pac. 465; Hines v. Driver, 100 Ind. 315, 323; Flournoy v. Marx, 33 Tex. 786. See also, Miller v. State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. 836, and note.

Where a party has failed to subpœna a witness, or to take his deposition, relying on his promise to be present, or on the fact that the other party had subpœnaed him, he has not used due diligence. Louisville &c. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Hensley's Adm'rs v. Lyttle, 5 Tex. 497, 55 Am. Dec. 741; Hutts v. Shoaf, 88 Ind. 894; Moore v. Goelitz, 27 Ill. 18.

As to what is sufficient to show due diligence, and as to other requisites of the affidavit, see note to Stevenson v. Sherwood, 74 Am. Dec. 140, and authorities there cited.

13. Counter-affidavits will not ordinarily be received, as the hearing is upon the showing made by the applicant.

Eslinger v. East *et al.*, 100 Ind. 434; Wick v. Weber, 64 Ill. 167; Manning v. Jameson, 1 Cranch (C. C.) (U. S.) 285; Miller v. State, 29 Neb. 437, 45 N. W. 451.

But this rule is held not to prevent the court from making further inquiry, or receiving further testimony, where it is suggested that fraud or imposition is being practiced. Cushenberry v. McMurray, 27 Kan. 328; Weed v. Lee, 50 Barb. (N. Y.) 354; and see State v. Wells (Iowa), 6 Crim. L. Mag. 39; Price v. People, 131 Ill. 223, 23 N. E. 639; State v. Bailey, 94 Mo. 311, 7 S. W. 425.

14. If the adverse party admits, or unconditionally offers to admit, as true the facts proposed to be established by the absent evidence, to obtain which the continuance is sought, the application should be denied.

Smith v. Creason's Ex'rs, 5 Dana (Ky.) 298, 30 Am. Dec. 688; Murphy v. Murphy, 31 Mo. 322; Pate v. Tait, 72 Ind. 450; Green v. King, 17 Fla. 452; State v. Plowman, 28 Kan. 569.

Such an admission would be sufficient to prevent a continuance in any jurisdiction, and in many of our states it is sufficient to admit that the witness, if present, would swear to the facts set forth in the affidavit. See authorities cited in note to Stevenson v. Sherwood, 74 Am. Dec. 140; also Hoyt v. People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239; State v. Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749; Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330.

In Indiana, and, perhaps, in other states, an admission that the witness will testify to the facts stated in the affidavit is sufficient in a civil cause. Whitehall v. Lane, 61 Ind. 93; Dawson v. Hemphill, 50 Ind. 422; while in a criminal case they must be admitted as true. Wheeler v. State, 8 Ind. 113. This distinction, however, is statutory. See also, 2 Elliott's Gen. Pr., § 485; and note in 122 Am. St. 757-759.

Where the truth of the facts is required to be, and is, admitted, the party making the admission ought not to be allowed to contradict them; but where he is not required to admit their truth, but simply admits that the absent witness would testify to them, he ought to be permitted to offer contradictory evidence. Brent v. Heard, 40 Miss. 370; Bestor v. Sardo, 2 Cranch (C. C.) (U. S.) 260; U. S. Life Ins. Co. v. Wright, 33 Ohio St. 533. But in Alabama it is held that he cannot offer evidence of counter-declarations of the absent witness in either case. Pol v. Devers, 30 Ala. 672.

15. Error in refusing a continuance because of the absence of a witness who afterward attends and testifies in the party's behalf is thereby cured.

Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493. See also, Cremeans v. Commonwealth, 104 Va. 860, 52 S. E. 362, 2 L. R. A. (N. S.) 721, and note.

16. Where a continuance is refused a party he should except to the ruling, and bring the affidavit into the record, and present the matter for review in the appellate court, if reviewable by the court, by bill of exceptions.

Shircliff v. State, 96 Ind. 369; Norton v. State, 106 Ind. 163, 6 N. E. 126; and note to Hyde v. State, 67 Am. Dec. 630-640. See also, East Dallas v. Barksdale, 83 Tex. 117, 18 S. W. 329.

CHAPTER II.

IMPANELING THE JURY.

"All issues that shall be joined between party and party in any court of record within the realm, except a few whereof it needeth not to treat at this time, must be tried by twelve free and lawful men."—*St. Germain.*

"The jurors retained are well known; they are not procured for hire; they are not of inferior condition; neither strangers nor people of uncertain character, whose circumstances or prejudices may be unknown."—*Sir John Fortescue.*

Practical Suggestions.

The jurors selected to try the cause should, as the great chancellor of Henry VI says, "neither be strangers nor people of uncertain character, whose circumstances or prejudices are unknown." Nor is the work of discovering the prejudices and circumstances of the jurors to be left to be done in the court-room. Much must be done prior to the time the advocate faces them in the box, but of this we have already spoken. We are now to speak of the work to be done in open court. The work of selecting a jury is a difficult and delicate one.[1] The advocate stands before the men who are to award him the victory or crush him with defeat, and it needs all the tact and care he can command to conduct himself so that he shall neither arouse resentment nor excite distrust. Sagacity, courtesy and judgment must combine to enable him to properly discharge his duty. Jurors are quick to resent any imputation upon their fairness, and prompt to detect any tricks or artifices. An unfavorable impression created at the

[1] As said in Melson v. Dickson, 63 Ga. 682, 36 Am. 128: "A big part of the battle is the selection of the jury, and an impartial jury is the cornerstone of the fairness of trial by jury." See also, Ensign v. Harney, 15 Neb. 330, 48 Am. 344; Diveny v. City of Elmira, 51 N. Y. 506.

outset is not easily dispelled. The mind upon which an impression is once made is like a sheet of paper once written over, for no matter how careful the attempt to erase the writing, some traces remain. So with the mind; no matter what is done, the impression is seldom totally eradicated.

Courtesy is the sovereign rule. No matter how much may be implied by the question asked the juror, its form should be such as not to give offense, and the manner in asking it be such as to invite confidence. Possibly there may be cases where, after the first few questions have been asked, the manner of the juror may be such as to require aggressive and decisive treatment, but these are rare cases. There should be no timidity, yet there need be no rudeness; for courtesy and boldness are not antagonistic. When there is necessity for searching the mind of a juror, it is to be done with vigor, but not in anger nor under excitement. The juror under examination may be excluded, but his fellows will remain, and they are quite likely to sympathize with the one challenged if he has been rudely handled. Frankness is a virtue seldom displayed to better advantage than in the examination of jurors. If the genuine article is not at hand, better its imitation than that it should appear to be entirely wanting. Where a juror is challenged it is better to openly and frankly disclose the reason for excluding him rather than to conceal it; not, indeed, by a parade of it, but quietly and indirectly. The disclosure cannot, as a rule, be made in express words, but the questions can be so framed as to convey to the minds of the other members of the jury the reason for the challenge. It is, of course, not every instance in which questions will be asked, for, if there is reason to believe that the answers will not disclose some plausible cause for challenging, it is wise to ask none, but to exercise the right of peremptory challenge promptly and boldly. If in advance of the trial it is determined to peremptorialy challenge a juror, the challenge should be made without interrogating him at all, unless there is ground for believing that his answers will do harm to the adverse party. Where, however, the challenge is for cause, then, as is sufficiently obvious, a different course must be pursued. In challenging, either peremptorily or for cause, the ad-

vocate should himself take the responsibility, and not make it appear that he does it reluctantly at the demand of his client. The just course is for the advocate to make it appear that he it is that deems it necessary to interpose the challenge.

Questions are not to be asked without a purpose. If the advocate is content with the jury, it is better to announce it without a question or a word of comment. The less distrust manifested as to the capacity and fairness of jurors the better. It is the safer practice, as a general rule, to interrogate jurors as if the examiner had no previous knowledge of matters affecting their competency. It is presumed that his investigation is conducted for the purpose of eliciting information not previously possessed, and nothing must be done to lead the jurors not under examination to suppose that the examiner is already in full possession of the information his questions indicate that he is seeking. No one, much less a juror in open court who assumes that he has been called into the box because of his fitness, likes to be annoyed with questions, and the fewer asked the better, except where many are demanded by the peculiar circumstances of the case. A question is very apt to be taken as a suggestion of the suspicion of unfitness or incapacity, and the fewer and politer the questions are the less likelihood is there of giving offense; nevertheless, there are cases where many questions must be asked. Where this is so, it should appear that there is a candid effort to obtain information, and not a purpose to annoy, for it must be kept in mind that other jurors are listening. If it happens that a question has wounded a juror's self-esteem, or exposed him to ridicule or censure, he, it is safe to presume, will be affronted, and if that presumption arises, he must, if it be possible, be removed from the panel. A keen eye must be kept upon each juror, and if a question touches a tender place, or makes him wince, a challenge must be made if the right is still open.[2] The nearer the right of peremptory challenge is exhausted the closer must be the scrutiny and the more careful the questioning. If there be an effort to evade, then the questions should be pressed home to obtain, if

[2] The inflection or manner of a juror may sometimes betray sentiment or prejudice which his words deny. Train's Prisoner at the Bar, 216.

it be possible, a reason that will support a challenge for cause. It is folly to interrogate for the mere purpose of show. If there is no object to be gained, questions are worse than useless; if there is an object to be attained, the questions must attain it or the work will be a vain one, from which no good can come, and from which harm may result. Mere formal general questions seldom serve any useful purpose; but, if asked at all, they should be asked in an indifferent manner, and as if no answer impugning the capacity or fitness of any juror were anticipated. It is not often that it is safe to accept the panel without an examination of each juror, but when it is, acceptance without formal or general questions is the true policy.

Two great objects are to be kept in view in interrogating jurors. These are, to obtain grounds on which to base a challenge for cause, and to obtain information upon which to determine whether it is expedient to interpose a peremptory challenge. What constitutes ground for challenge for cause is a purely legal question. If the grounds are fully exhibited, then the advocate must determine whether he will exercise his right. He is not bound to challenge for cause even when cause is disclosed. It is, however, generally better to challenge in such cases, for this reason: if the advocate allows one whose incompetency is disclosed by his examination to remain in the box, his fellows are very likely to attribute it to some sinister motive. No general rule can be laid down for all cases; the advocate's sagacity and judgment must determine the question in many cases, but this much may be safely said: if there is doubt, exercise the right.

The right of peremptory challenge is one that requires careful handling. It must not be so exercised as to bring a worse man into the box than the one sent out of it. The right must be exercised sparingly when the challenges are limited to a small number, since there is always great risk in picking up jurors from the by-standers. In more cases than one men have been brought into the court-room in the expectation that they might be called into the jury-box. When there is reason to suspect this, it is the true policy to question closely as to the man's business, how his time is occupied, and why he happened in the court-room.

In such a case great tact is requisite, and the questions must be adroitly framed. A blunder in such an exigency would work a deal of mischief. It would be a fatal mistake to offend a man thus called into the box by intimating, even by the remotest indirection, that he was in the court-room for the purpose of corruptly securing a place on the panel, unless it is very certain that a challenge can be maintained.

The mistake is often made of interrogating jurors as if the only result to be attained was a disclosure that should make good a challenge for cause, whereas, an important purpose of the examination is to assist the examiner in determining whether it is expedient to interpose a peremptory challenge.[8] There are many things that would not constitute a basis for a challenge for cause, but which would show the advisability of exercising the right of peremptorily challenging a juror. The information as to the business, habits, residence and the like of the juror may be such as to make it expedient not to allow him to remain on the panel, and yet nothing be disclosed in his answers on which to base a challenge for cause. Prejudice rules the minds of many men, and will carry them against truth and justice. It has been said that "divesting one's self of prejudice is like taking off the skin," and the reluctance which jurors often manifest in putting aside their prejudices goes far to prove the truth of this saying. The influence of prejudice is a subtle and far-reaching one, and it requires no little care to prevent it from operating to the great injury of even a plain and just cause. Of course, it may be so strong as to supply grounds for challenge for cause, and when this is so the way is clear; but it is the prejudice not so strong as to sustain a challenge for cause that makes the way difficult and dangerous.

There are many things which will influence a weak, bigoted or narrow-minded man that would not affect stronger and better men; so that it is often important to know both the man and his

[8] Pearcy v. Michigan &c. Co., 111 Ind. 59, 12 N. E. 98. See also, Watson v. Whitney, 23 Cal. 375; Donovan v. People, 139 Ill. 412, 28 N. E. 964; State v. Godfrey, Brayt. (Vt.) 170.

prejudices.[4] The character of the case has much to do with a selection of a jury, and in every instance the examination should be conducted with reference to the case at bar, and no other, since the prejudices of the jurors concerning the particular business or transaction out of which the case arose is what is to be discovered. If the case is one appealing to the finer feelings of humanity, then the fewer coarse men on the jury the better for the cause. If the case is that of a rich man against a poor one, then the one side will desire poor men, the other rich men. If a will is attacked on the ground that the testator was enfeebled by age, the plaintiff will seek young jurors, the defendant old ones. If the business is one against which there is a general hostility, then the best that can be done is to keep off the bitter men and secure the moderate ones. If a dram-seller is a party, his advocate will be careful not to allow a prohibitionist to sit as a juror.[5] But enough has been said to point the way, and that

[4] There is often an unconscious bias due to race, prejudice, religion, business or character. Train's Prisoner at the Bar, 213. Many lawyers, where their client is an Irishman, a negro, a Hebrew or an Italian, challenge jurors of any of the other of these nationalities. See also Train's Prisoner at the Bar, *supra;* Wellman's Day in Court, 125.

[5] "Look sharply after your jury panel," says Mr. Warren. "Otherwise you may have, as one of your judges, one whom no evidence, no arguments, would persuade to give your client a verdict; one who may be his personal enemy, or the friend, or relation, of your opponent; or may belong to some trade, profession, or calling, which would be injuriously affected by your success; or enjoy rights in respect of property situated similarly with that which you seek to affect with liability. One of the present chief justices, a man of great experience, consummate prudence, and singular success in the conduct of causes, when at the bar gave me a hint of this kind in the very first in which I ever held a brief with him. 'Observe,' said he, 'what I am going to do, and you do the same when your turn comes. I am going to look at the jury panel, that I may get quietly rid of some obnoxious jurymen. Here our opponent is a publican, and the case is one in which all publicans are likely to feel a strong bias in his favor. Now, peradventure, there is a publican in the jury-box —but perhaps our client has already seen to this.' That gentleman, however, on being asked, acknowledged that 'he had not thought of it;' on which my leader, in a whisper to the usher, told him to get the jury panel from the officer; and, on looking over it, sure enough! there were two pub-

is all that our present work requires. It may be well to add, however, that homogenity is usually to be sought if a verdict is expected and desired, whereas the party who can hope for no more than a "hung" jury will generally gain by obtaining jurors of diverse interests, race and character.

licans quietly ensconced in the box, having, doubtless, had a hint from our opponent to be in attendance when the cause was called on."—Warren's Duties of Attorneys, 192, 193.

RULES OF LAW.

1. The right of trial by jury is a constitutional right in many cases, and where it is thus preserved and guaranteed it is a right that cannot be taken away except by the consent, express or implied, of the person entitled to claim it.

Eshelman v. Chicago &c. R. Co., 67 Iowa 296; 25 N. W. 251; Galway v. State, 93 Ind. 161; Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178, and note 185.

The provisions of the Constitution of the United States upon this subject do not apply to the separate states. Baker v. Gordon, 23 Ind. 204; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Butler v. State, 97 Ind. 378; Commonwealth v. Whitney, 108 Mass. 5; Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. ed. 464.

2. Where the right to a jury is given by constitution or statute, unless otherwise stated, a common-law jury of twelve men is meant.

Work v. State, 2 Ohio St. 296, 59 Am. Dec. 671; People v. Justices, 74 N. Y. 406; State v. Mansfield, 41 Mo. 475; Cooley's Const. Lim. (5th ed.) 391; 1 Bish. Crim. Pro. (1st ed.), § 761. See also note in 43 L. R. A. 34, *et seq.*

3. In a civil case a party may waive his right to a jury of twelve, and be tried by a less number;[1] but in a criminal case,

[1] Lee v. Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248; Marsh v. Brown, 57 N. H. 173.

especially if it be a prosecution for a capital offense, it seems he cannot do so.[2]

[2] Territory v. Ah Wah, 4 Mont. 149, 1 Pac. 732, 47 Am. 341; State v. Holt, 90 N. Car. 749, 47 Am. 544; Allen v. State, 54 Ind. 461; Cancemie v. People, 18 N. Y. 128; note to King v. State, 3 L. R. A. 210, 211; and other cases reviewed in note to *Re* McQuown, 11 L. R. A. (N. S.) 1136.

But in many of the states statutes permitting a waiver of the right of trial by jury, except in capital cases, have been upheld as constitutional. Murphy v. State, 97 Ind. 579; State v. Worden, 46 Conn. 349, 33 Am. 27; Moore v. State, 21 Tex. App. 666, 2 S. W. 887; Connelly v. State, 60 Ala. 89, 31 Am. 34. For additional authorities, and a discussion of the question of the power to waive a jury trial, see "Waiver of Constitutional Rights in Criminal Cases," 6 Crim. Law Mag. 182-184. See also, 12 Crim. Law Mag. 12; 36 Cent. Law Jour. 437; and note in 11 L. R. A. (N. S.) 1138.

4. Under a constitution preserving the right of trial by jury, or providing that it shall "remain inviolate," the right is not enlarged or extended, but remains as it was at common law, or as it was at the time the constitution was adopted.

Carmichael v. Adams, 91 Ind. 526; Livingston v. Mayor, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; Scudder v. Trenton &c. Co., 1 Saxton Ch. (N. J.) 694, 23 Am. Dec. 756; Anderson v. Caldwell, 91 Ind. 451; Kendall v. Post, 8 Ore. 141; notes in 1 L. R. A. 180 and 632.

5. The qualifications necessary to be possessed by jurors are usually fixed by statute; but the right to challenge a juror for any good and sufficient cause, whether specified in the statute or not, is a common-law right that always exists, unless taken away by express enactment.

Barrett v. Long, 3 House of L. Cas. 395, 415. And see Block v. State, 100 Ind. 357.

6. Where there is partiality or any irregularity or default on the part of the officer selecting or arraying the panel, likely to injure a party, he may challenge the array or entire body of

jurors collectively. But this form of challenge is now seldom used.

Munshower v. Patton, 10 Serg. & Rawle (Pa.) 334, 13 Am. Dec. 678; Cowgill v. Wooden, 2 Blackf. (Ind.) 332; Thomp. & M. on Juries, § 126, *et seq.*

As to what is not sufficient cause for challenge to the array, see *In re* First Street, 58 Mich. 641, 26 N. W. 159; People v. Coffman, 59 Mich. 1, 26 N. W. 207; People v. Kiernan, 101 N. Y. 618, 4 N. E. 130. See also, 20 L. R. A. (N. S.) 1013; State v. Barnes, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932.

7. A challenge to the array, although sustained, may be withdrawn or waived, even in a criminal case.

Pierson v. People, 79 N. Y. 424, 35 Am. 524.

8. The principal grounds of challenge to the polls, that is, to any of the jurors individually, for cause, are: (a) Interest of the juror, (b) lack of statutory qualifications, (c) relationship to one of the parties, (d) personal hostility, (e) a pending lawsuit between the juror and the party, (f) dependence of the juror on one of the parties, (g) the expression of a positive opinion upon the merits of the cause.

Fleming v. State, 11 Ind. 234, 236; 1 Bishop Crim. Pro., § 764, *et seq.*; Thomp. & M. on Juries, § 170, *et seq.*

(*a*) The interest necessary to disqualify need not always be a pecuniary one. Cleage v. Hyden, 6 Heisk. (Tenn.) 73; Fleming v. State, *supra.*

Citizenship in a town or city which is a party to an action, and interest therein as a taxpayer, are sufficient to disqualify, unless otherwise provided by statute. Hearn v. City of Greensburg, 51 Ind. 119; Diveny v. City of Elmira, 51 N. Y. 506; Kendall v. City of Albia, 73 Iowa 241, 34 N. W. 833; Broadway Mfg. Co. v. Leavenworth &c. Co., 81 Kan. 616, 106 Pac. 1034, 28 L. R. A. (N. S.) 156; Commonwealth v. Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. 736, 750, 1 L. R. A. 620. And some courts have even extended this rule to cases in which a county is a party. Board of Commissioners v. Loeb, 68 Ind. 29. But for practical reasons this seems to carry the doctrine too far. Proffatt on Jury Tr., § 169.

Mere membership in an association formed to prosecute cattle-thieves

or check a certain kind of crime has been held not to disqualify, *per se*, a juror in a prosecution for such crime. Boyle v. People, 4 Colo. 176, 34 Am. 76; State v. Wilson, 8 Iowa 407; People v. Graham, 21 Cal. 262; Commonwealth v. Thresher, 11 Gray (Mass.) 57. But see Commonwealth v. Livermore, 4 Gray (Mass.) 18; People v. Lee, 5 Cal. 353. The trial court should, however, in such cases, exercise a wise discretion, and, as a matter of justice, excuse the juror. See also, Tucker v. Buffalo Cotton Mills, 76 S. Car. 539, 57 S. E. 626, 121 Am. St. 957.

(*b*) For the necessary statutory qualifications the statutes of each particular state must be consulted. It is usually provided, however, that a juror must be a resident freeholder or householder, or both. A householder has been defined as "the head of a family occupying a house." 1 Work's Ind. Pr. & Pl., § 763; Carpenter v. Dame, 10 Ind. 125, 130; Aaron v. State, 37 Ala. 106, 113; Abbott's Law Dict. 574. It is also stated that one is to be deemed a householder "upon whom rests the duty of supporting the members of his family or household." Bunnell v. Hay, 73 Ind. 425.

(*c*) Relationship of a juror to a party, either by consanguinity or affinity, disqualifies. Hudspeth v. Herston, 64 Ind. 133; Cain v. Ingham, 7 Cal. (N. Y.) 478; Proffatt's Jury Tr., § 174. The degree to which this extends is usually specified by statute, but Blackstone states the rule as extending to all degrees within the ninth. 3 Blackst. Com. *363. See also, Wirebach v. Eastern Bank, 97 Pa. St. 543-552; note to Commonwealth v. Brown, 9 Am. St. 753; Tegarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549. It is also held that the relationship of a juror to an attorney, whose fees depend on the result of the action, is sufficient to disqualify him. Melson v. Dickson, 63 Ga. 682, 36 Am. 128. And see Georgia R. R. Co. v. Hart, 60 Ga. 550; Bailey v. Trumbull, 31 Conn. 581, 583. But compare Funk v. Ely, 45 Pa. St. 444; State v. Jones, 64 Mo. 391; Wood v. Wood, 52 N. H. 422.

(*d*) Personal hostility, even though it be general, and without special reference to the matter in controversy, may be sufficient to render a person incompetent to serve as a juror. Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Brittain v. Allen, 2 Dev. (N. Car.) 120.

(*e*) Human nature is such that, where an action is pending between two parties, there is not likely to be the best of feeling between them, nor the impartiality and freedom from bias or prejudice requisite to permit one of them to become a juror on the trial of an action to which the other is a party; and where this is so it is ground for a challenge for cause. 1 Chit. Crim. Law 542; Co. Litt. 157.

(*f*) A juror, instead of being hostile, or having any ill-feeling toward

either party, may simply be dependent upon, or subject to, the control of one of the parties, but this is sufficient ground for challenge by the other party without showing any actual bias. 1 Chit. Crim. Law, 541. Thus, an employe of either party is ordinarily disqualified. Hubbard v. Rutledge, 57 Miss. 7; Central R. R. Co. v. Mitchell, 63 Ga. 173. And so is a tenant. Hathaway v. Helmer, 25 Barb. (N. Y.) 29. See also, Block v. State, 100 Ind. 357; Zimmerman v. State, 14 West. 833; Stumm v. Hummel, 39 Iowa 478.

(*g*) As to what kind of an opinion formed or expressed by a juror concerning the merits of the cause or the guilt of an accused will disqualify him, there is considerable conflict in the authorities. Mr. Bishop says: "If, therefore, to repeat the words of Hawkins, the juror 'hath declared his opinion before hand that the party is guilty, or will be hanged, or the like,' he is, according to the doctrine accepted nearly everywhere in the United States, and probably in every other locality where the common law prevails, incompetent." 1 Bish. Crim. Pro., § 771, citing a number of authorities by states. He also states that "it is vain for a man to say, or even believe, that he can judge impartially of a matter which he has already determined. * * * It is immaterial, therefore, whether the belief which comes not according to law is derived from rumor, or from listening to statements of a more reliable sort." *Id.*, § 772. This seems, in theory, both plausible and reasonable, but it is believed that the weight of authority is now to the effect that if the juror testifies, to the satisfaction of the court, that he believes his previously formed opinion will have no effect, but will yield to the evidence, and that he can render an impartial verdict according to the law and evidence, he should be allowed to serve. Guetig v. State, 66 Ind. 94, 32 Am. 99; Bales v. State, 63 Ala. 30; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Doll v. State, 45 Ohio St. 445, 15 N. E. 293; Steagald v. State, 22 Tex. App. 464, 3 S. W. 771; Thomps. & M. on Juries, § 207, *et seq.* See also the leading case of Smith v. Eames, 3 Scam. (Ill.) 76, 36 Am. Dec. 515, and note, where many authorities are cited and reviewed, holding that an opinion, to disqualify, must be positive and fixed, and not merely hypothetical. Also, English v. State, 31 Fla. 340, 12 So. 689; People v. McGonegal, 136 N. Y. 62, 32 N. E. 616; Moschell v. State, 54 N. J. L. 390, 22 Atl. 50, 13 Crim. Law Mag. 742; O'Mara v. Commonwealth, 75 Pa. St. 424; State v. Kingsbury, 58 Me. 238; McGregg v. State, 4 Blackf. (Ind.) 101. And see, Early v. State, 51 Tex. Cr. 382, 103 S. W. 868, 123 Am. St. 889; notes in 63 L. R. A. 807, and in 68 L. R. A. 871.

Opinions founded on mere newspaper rumors will not disqualify if the juror believes he can try the cause impartially. Dolan v. State,

40 Ark. 454; Butler v. State, 97 Ind. 378; People v. Gage, 62 Mich. 271, 28 N. W. 835; Garlitz v. State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601; Rose v. State, 2 Wash. St. 310, 26 Pac. 264.

The presumption, where the opinion has no other foundation, is, that it is merely hypothetical, and not fixed or positive. Jackson v. Commonwealth, 23 Gratt. (Va.) 919. This seems the only practical rule, for if every one who reads the newspapers were to be thereby disqualified, our juries would not only be difficult to obtain, but would, also, be of the worst and most ignorant classes. It is not, however, so much the source as it is the character or nature of the opinion that is to be considered. Boon v. State, 1 Ga. 631; Wormeley's case, 10 Gratt. (Va.) 658.

Opinions on collateral or mere incidental questions, not likely to influence the verdict, do not, ordinarily, disqualify. Hughes v. City of Cairo, 92 Ill. 339; Cargen v. People, 39 Mich. 549. But compare Brockway v. Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708. Thus, an opinion as to the morality of a business, or the like, if not positive, and not likely to influence the verdict, will not, as a rule, disqualify, but the matter rests, to a great extent, in the sound discretion of the trial court. Elliott v. State, 73 Ind. 10; State v. Nelson, 58 Iowa 208, 12 N. W. 253; Williams v. State, 3 Ga. 453; United States v. Noelke, 17 Blatchf. (U. S.) 554; Albrecht v. Walker, 73 Ill. 69; Spies v. People (Ill.), 12 N. E. 865. But see Robinson v. Randall, 82 Ill. 521, where, under the circumstances of the case, it was held to disqualify. Nor, it seems, will an opinion formed as to the guilt or innocence of the principal disqualify a juror on the trial of the accessory. Weston v. Commonwealth, 111 Pa. St. 251, 2 Atl. 191. But it is held that one who has heard the evidence on the trial of one defendant is disqualified to sit as a juror on the trial of a co-defendant. Arnold v. State, 9 Tex. App. 435; Morton v. State, 1 Kan. 468. See also notes in 63 L. R. A. 807, and in 68 L. R. A. 871.

Conscientious scruples against capital punishment, or convicting on circumstantial evidence, are generally held to disqualify. O'Brien v. People, 36 N. Y. 276; Fahnestock v. State, 23 Ind. 231; State v. Ward, 39 Vt. 225; Jones v. State, 57 Miss. 684; People v. Stewart, 7 Cal. 140. So, on the trial of a civil action, an opinion that the defendant has already been sufficiently punished by having been prosecuted criminally for the same wrong will render a juror incompetent. Asbury Life Insurance Co. v. Warren, 66 Me. 523, 22 Am. 590.

9. In order to discover whether there are proper grounds to

challenge for cause, each party is entitled, at the proper time, to examine or interrogate every juror, under oath, as to his impartiality and qualifications as a juror.

Watson v. Whitney, 23 Cal. 375; 1 Bish. Crim. Pro., § 795; 2 Elliott's Gen. Pr., § 526.

The questions must, however, be fair and honest, and not such as tend to disgrace the juror. Burt v. Paujaud, 99 U. S. 180, 181, 25 L. ed. 451; 3 Blk. Com. *363. See also, Jenkins v. State, 31 Fla. 196, 12 So. 677.

This right to interrogate extends to facts not directly disqualifying, if, with others, they tend to disqualify. Mechanics' &c. Bank v. Smith, 19 Johns. (N. Y.) 115. But this is a matter that must be left largely in the discretion of the trial court. See also to the effect that considerable latitude is allowed, State v. Chapman, 1 S. Dak. 414, 47 N. W. 411, 10 L. R. A. 432; note to Commonwealth v. Brown, 9 Am. St. 746, where it is said that a juror may be asked hypothetical questions as to how he would decide under a supposed state of facts or if the evidence were equally balanced; but the cases cited do not fully support this statement. One of them has been overruled and the weight of authority is to the contrary. Chicago &c. R. Co. v. Fisher, 141 Ill. 614, 13 N. E. 406; Woollen v. Wire, 110 Ind. 251, 11 N. E. 236; 1 Thomp. Tr., § 102; 2 Elliott's Gen. Pr., § 526.

10. Where a juror is challenged for cause, he may not only be examined, but other evidence may also be received to prove the ground of challenge.

Burt v. Paujaud, 99 U. S. 180, 25 L. ed. 451; People v. Mathers, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

11. Each party is entitled to a certain number of peremptory challenges, the exact number depending on the statute of the particular jurisdiction.

As stated by Lord Coke, this kind of challenge is allowed a party "upon his own dislike, without shewing any cause." Co. Lit. 156b. See also, 1 Chit. Crim. Law 534; 1 Bish. Crim. Pro., §§ 796, 804.

12. Where several defendants make a joint defense, they are entitled, unitedly, under statutes allowing a certain number

of peremptory challenges to "each party," to no more peremptory challenges than one defendant would have.

Stone v. Segur, 93 Mass. 568; Snodgrass v. Hunt, 15 Ind. 274; Stroh v. Hinchman, 37 Mich. 490; Thomp. & M. on Juries, § 165. See also, Hargrave v. Vaughn, 82 Tex. 347, 18 S. W. 695; United States v. Hall, 44 Fed. 883, 10 L. R. A. 323.

13. Where several defendants plead separate[1] by different counsel, it seems that if the r such that a different verdict may be rei may insist on the entire statutory numb lenges.

Fraser v. Jennison, 42 Mich. 206, 3 N. W. 88 Mich. 490. See also, Mut. Life Ins. Co. v. 36 L. ed. 707, 12 Sup. Ct. 909.

This was certainly the case at common law wh separate, and, perhaps, even where joint. Unit 4 Mason (U S.) 158; 2 Hawk. P. C., Chap. X State, 9 Ala. 137, 44 Am. Dec. 431; Bixbee v Thomps. & M. on Juries, § 162; 1 Bish. Crim Pr

14. The right to challenge, either peremptoril may be exercised at any time before the juror i the cause.

1 Bish. Crim. Pro., § 806, and authorities cited in note; Pr., § 528. The ground of challenge for cause must stated.

15. Acceptance of a juror without examination qualifications is a waiver of all objections that might h discovered thereby.

Faville v. Shehan, 68 Iowa 241, 26 N. W. 131, 132; Yanez v. Tex. App. 429, 32 Am. 591; Wassum v. Feeny, 121 Mass. 93 v. Powers, 10 Ore. 145; Croy v. State, 32 Ind. 384; Meeks v. 57 Ga. 329; Manion v. Flynn, 39 Conn. 330; 1 Bish. Crim. Pro., 1 Bish. Crim. Law (3d ed.), § 843; Harris Crim. Law 329; Rc v. Ames, 2 N. H. 349, 9 Am. Dec. 79, and note, 82. See also, S v. Goetz (N. Dak.), 131 N. W. 514, and cases cited on page 5. Locke v. Commonwealth (Ky.), 137 S. W. 1043; Queenan v. Okl

homa, 190 U. S. 548, 47 L. Ed. 1175, 23 Sup. Ct. 762. But see, in a criminal case, State v. Grome, 10 Iowa 308.

16. The weight of authority asserts the rule that a peremptory challenge, and the exclusion of a juror thereon, will waive an exception to the overruling of a challenge of such juror for cause.

Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Friery v. People, 2 Keyes (N. Y.) 424; Conway v. Clinton, 1 Utah Ter. 215; Hirsh on Juries, § 489; Stewart v. State, 13 Ark. 720. And see, Heucke v. Milwaukee City Ry. Co., 69 Wis. 401, 34 N. W. 243; Minich v. People, 8 Colo. 440, 9 Pac. 4. *Contra,* Brown v. State, 70 Ind. 576 (overruled in Siberry v. State, 149 Ind. 684, 704, 39 N. E. 936, 47 N. E. 458); Brown v. State, 57 Miss. 424, 10 Cent. Law Jour. 376; People v. Bodine, 1 Denio (N. Y.), 281.

If the peremptory challenges are thereby exhausted before the completion of the jury, however, error in overruling the challenge for cause may be fatal. See Hopt v. People, 110 U. S. 574, 28 L. ed. 262, 7 Sup. Ct. 614; Dowdy v. Commonwealth, 9 Gratt. (Va.) 727. And, on the other hand, it is generally held that error in overruling a challenge for cause is not available on appeal if it appears that the jury was completed without exhausting the peremptory challenges to which the challenging party was entitled. Siberry v. State, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458; State v. Elliott, 45 Iowa 486; 2 Elliott's Gen. Pr., § 529.

CHAPTER III.

THE RIGHT TO OPEN AND CLOSE THE CASE.

"For neither party can retract what he has before conceded on the record."—*James Gould.*

"It was my practice, contrary to that of most lawyers who had the right of choice, to open the argument, rather than close it, where two speeches were to be made on the same side."—*Judge Samuel F. Miller.*

"And upon this it is hardly necessary to remind you that it is ordinarily deemed a decided advantage to have the 'last word,' or concluding argument to the jury."—*Professor Washburne.*

Practical Suggestions.

The right to open and close the evidence and argument is a very important one, and is always worth striving for;[1] but it is, nevertheless a right which may be too dearly purchased. Usually it resides in the plaintiff, but in many cases the pleadings may be so framed as to secure it for the defendant. In the pursuit of this right, counsel have often been led into error, for, in their anxiety to secure it, they have admitted facts fatal to their case. One who seeks to secure this right needs to be very careful not to permit his eagerness to secure the first and the last words to betray him into admissions that neither evidence nor argument can overcome. This will result if facts are admitted that make a complete case for his adversary, for admissions in the pleadings necessarily conclude the party making them. The pleadings present the issue for trial, and what is ad-

[1] It is a valuable right and it is reversible error in most jurisdictions to wrongfully deprive one of it. Clarkson v. Meyer, 14 N. Y. S. 144; Blackledge v. Price, 28 Ind. 466; Mercer v. Whall, 5 Ad. & El. (N. S.) 447; Meade v. Logan (Tex. Civ. App.), 110 S. W. 189; 2 Elliott's Gen. Pr. § 533.

mitted is, for the purpose of the trial, at least, deemed incontestably true.

The principal advantage which accrues from the right to open and close is supposed to be the privilege of making the last address to the jury. Mr. Chitty, speaking of the right to open and close the case, says: "It is considered important because, in general, the party who begins will, if his opponent offer any evidence, have the general reply, or last word to the jury, a privilege which a powerful leader can usually exercise with great advantage."[2] There are cases in which this privilege is so valuable as to warrant concessions that will make the way of the plaintiff to a verdict safer and smoother, and in such cases there should be no hesitation in making such concessions. Counsel should always be mindful, however, of the danger of conceding facts that will establish his opponent's case beyond the power of evidence or argument to defeat it. Nor is the advantage reaped in any case without assuming a burden. One who secures the right to open and close takes it with the burden of defeating a *prima facie* case; for so much he concedes to his opponent. This is sometimes a dangerous course, since it always puts the burden of proof upon the party who secures the advantage, and relieves the plaintiff entirely from the necessity of offering any evidence in support of his own case. It is manifest, therefore, that to so plead as to assume the burden renders it impossible to present any question upon the lack of evidence to support the plaintiff's case, as well as impossible to secure any advantage from rulings on evidence which, had a denial been interposed, the plaintiff would have been compelled to offer. In not a few cases disastrous consequences have resulted from an overeagerness to secure the first and last words, and it is not prudent, therefore, to be over eager to secure the right to open and close. There are many things to be considered before assuming the burden.

In actions for personal injuries, where the defense is by way of justification, it is, in general, better for the defendant to assume the burden, since, despite all that can be done, it is practi-

[2] 3 Chitty Gen. Pr., 872.

cally impossible for one who both justifies and denies, to satisfy a jury that either defense is valid. In such cases the bolder course is generally the expedient one. One who both denies and justifies occupies an unenviable position. Of course, where there is reason to believe that the plaintiff can not make a *prima facie* case, or where there is reason to believe that the defendant can disprove it, the fight must be made upon the denial, and the open and close yielded to the plaintiff. In actions for slander it is sometimes expedient to assume the burden, even though there is not much hope of establishing a justification, for such a course often enables the advocate, by an adroit argument, to secure a mitigation of damages. But this course ought not to be pursued unless there are some facts which will give the defense a fair appearance of justification. In actions for negligence the plaintiff, in almost every conceivable case, has the burden, for the defendant cannot safely confess his wrong. Possibly a case might arise in some jurisdictions where it would be safe to admit the defendant's negligence,[8] and defend upon the ground that the plaintiff brought the injury upon himself by his own fault, but this course cannot be pursued in those jurisdictions where the plaintiff must allege and prove that he was free from contributory negligence.

Where the plaintiff bases his cause of action upon a fraudulent representation, it is sometimes expedient to rely upon an affirmative defense, as, for instance, where there has been an accord and satisfaction, a former recovery, or the like; but where there are no defenses of this character the right to open and close must, of necessity, be conceded to the plaintiff. The defendant may often safely assume the burden in actions to recover damages for injuries to real or personal property, as, for instance, where the act was done under a license, or where the damages have been paid, or where there has been an accord and satisfaction. In this class of cases the error most frequently committed is that of making a dual defense, for defend-

[8] As a matter of fact, in such cases the fight is generally in the main upon the question of contributory negligence.

ants very often plead in denial when it would be much safer to plead in confession and avoidance.

It by no means follows that, because all defenses may be given in evidence under the general denial, the general denial should be pleaded. In actions for trespass, and in replevin, it is many times expedient for the defendant to take the burden, as, for instance, where he justifies under an execution or a writ of attachment. In such cases the general denial, or general issue, seldom secures any substantial advantage, and where none is secured by it the true course is to plead an affirmative defense specially. Where the statute of limitations can be safely relied on it is better to stand upon it and assume the burden. To most men there is such a manifest inconsistency between a denial and a defense founded on the statute that the one defense is assumed to be destructive of the other. If the statute cannot be safely relied on, better leave it entirely out of the case; if it can be, then stand upon it to the last. If, however, part payment, or a new promise, or some act that waives the bar of the statute, is likely to be interposed, then it is better to answer in denial as well as to plead the statute.

In actions for a breach of contract where the defense does not go to the execution of the contract, or to the performance, or to the amount of damages, it is always expedient to plead specially and take the burden of proof. This course cannot, it is obvious, be safely adopted where there is a dispute as to the execution of a contract, nor, in general, where there is a question as to the performance of the contract, or a question as to the amount of recovery. Where, however, the defense is affirmative, and goes to the entire right of recovery, it is better to rely entirely on the affirmative defense, and not to plead in denial. It is sometimes better to plead specially and without a denial where only a partial defense is interposed, as, for instance, where the only defense is that part of a sum claimed to be due the plaintiff has been paid. In cases of written contracts it is useless to plead in denial, unless the execution of the contract is disputed or performance is controverted, since all that a denial accomplishes is to require evidence of execution and

performance. Where the consideration of a contract is impeachable because of fraud, illegality, or utter insufficiency of consideration, it is the true policy of the defendant to assume the burden. This is true of cases where the statute of frauds constitutes the defense, where the statute of limitations is entirely relied on, where the sole defense is payment, and where it is an accord and satisfaction.

It is in general true that, where the defense rests entirely on facts that have come into existence since the execution of the contract, the true policy is to plead specially, so as to secure the right to open and close. But, be it kept in mind, only general rules can be stated and general suggestions made, and these can not fit every case. In this branch of an advocate's practice, as well as elsewhere, he must think for himself, and for himself determine the plan best suited to the case in hand. General rules and suggestions doubtless will aid him, because they will put his mind upon the correct line of reasoning, but they can do little more.

The party who takes upon himself the burden must not be unmindful of the fundamental principle that he who asserts a fact which is essential to his cause of action or to his defense must prove it, for he cannot rely upon the weakness of his adversary. It is generally the plaintiff who "must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof of his adversary."[4] But where the defendant concedes the plaintiff's *prima facie* case, and undertakes to avoid it, the positions are changed, and it is the defendant who must rely on the strength of his own case, for no weakness in that which he confesses will avail him. In effect, he assumes the burden of proving a new case, since he necessarily concedes to his adversary a *prima facie* case, and this new case must be so fully made out, irrespective of the weakness of the case conceded to the plaintiff, as that it shall in itself become a *prima facie* case in the defendant's favor. If a case thus made out by the defendant is not successfully met by the plaintiff, then, no matter how

[4] Best's Presumptive Evidence, § 267.

strong the case conceded to the latter, the defendant will succeed; but if the defendant does not thus make out his case, then he will fail, no matter how weak the case conceded to the plaintiff may be.[5] If, therefore, the defendant desires to avail himself of any weakness of his adversary, he must not, if he can avoid it, concede to him a *prima facie* case; nor, if he distrusts his own strength, should he rely entirely on an affirmative defense, except, indeed, where no other course is open to him.

[5] Best's Presumptive Evidence, § 267.

RULES OF LAW.

1. As a general rule, the party upon whom rests the burden of the issue, usually the plaintiff, has the right to open and close.

1 Greenl. Ev., § 74; Kirkpatrick v. Armstrong, 79 Ind. 384; Johnson v. Josephs, 75 Me. 544; Dille v. Lovell, 37 Ohio St. 415; Swafford v. Whipple, 3 G. Greene (Iowa) 261, 54 Am. Dec. 498; 2 Best Ev., § 637. See also, 1 Elliott Ev., §§ 132, 133.

It seems, however, to be the rule in Alabama, California, Massachusetts and Maryland for the plaintiff to open and close in all cases. Chamberlain v. Gaillard, 26 Ala. 504; Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342; Dorn v. Tremont Bank, 128 Mass. 349; Brooke v. Townsend, 7 Gill. (Md.) 10, 25.

The rule is sometimes stated as follows: The party who would be defeated if no evidence were given on either side must first produce his evidence, and has the right to open and close. Osborne v. Kline, 18 Neb. 344, 25 N. W. 360; Lexington Ins. Co. v. Paren, 16 Ohio 324, 330; Broom's Com. *221. See also, "Right to Begin and Reply," 25 Cent. L. J. 171.

This rule applies where the plaintiff has only to prove his damages. Johnson v. Josephs, 75 Me. 544; Baltimore & Ohio R. R. Co. v. McWhinney *et al.*, 36 Ind. 436; Mercer v. Whall, 5 Ad. & El. (N. S.) 447; Cunningham v. Gallagher, 61 Wis. 170, 20 N. W. 925.

But where the damages are liquidated, and nothing more than a mere computation of interest or attorney's fees, or the like, is necessary, the rule is otherwise. Huntington v. Conkey, 33 Barb. (N. Y.) 218, 228. See also, Blackledge v. Pine, 28 Ind. 466; Harvey v. Ellithorpe, 26 Ill. 418.

It was held, however, in a suit upon a promissory note providing for

reasonable attorney's fees, where the defendant pleaded payment and a set-off, that an admission by him that a certain sum would be a reasonable attorney's fee, if the entire amount of the note should be recovered, did not entitle the defendant to the open and close, as the plaintiff might recover a part only of the entire amount. Camp v. Brown, 48 Ind. 575.

2. Where there are several issues, the plaintiff is entitled to the open and close, if the burden is on him to prove any one of them.

Johnson v. Maxwell, 87 N. Car. 18; Jackson v. Hespeth, 2 Stark. 518; Bowen v. Spears, 20 Ind. 146; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Montgomery v. Swindler, 32 Ohio St. 224, 226; Tennessee Coal &c. Co. v. Hamilton, 100 Ala. 252, 14 So. 167, 46 Am. St. 48, 54; 2 Best Ev., § 637; 1 Stark Ev., *382.

3. Where there are several defendants, the plaintiff may open and close, if he has the right to begin as against any one of them.

Clodfelter v. Hulett, 92 Ind. 426; Kirkpatrick v. Armstrong, 79 Ind. 384. Compare Sodousky v. McGee, 4 J. J. Marsh. (Ky.) 267.

4. The right and duty to open and close are correlative; so that one who has the right to begin may be required to do so.

Osborne v. Kline, 18 Neb. 344, 25 N. W. 360.

5. The defendant may acquire the right to begin by admitting all the material allegations of the complaint and setting up an affirmative defense in his answer,[1] or, in most jurisdictions, by admitting at the trial all such facts as the plaintiff would have to prove to entitle him to recover his entire claim.[2]

[1] Thurston v. Kennett, 22 N. H. 151; Huntington v. Conkey, 33 Barb. (N. Y.) 218; McCormick &c. Co. v. Gray, 100 Ind. 285. And see Conselyea *et al.* v. Swift, 103 N. Y. 604, 9 N. E. 604; Osgood v. Groseclose, 159 Ill. 511, 42 N. E. 886; Fuller v. Worth, 91 Wis. 406, 64 N. W. 995; Home Benefit Ass'n v. Sargent, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. 332.

[2] Campbell v. Roberts, 66 Ga. 733; City of Aurora v. Cobb, 21 Ind.

493. But see Lake Ontario Nat. Bank v. Judson, 122 N. Y. 278, 25 N. E. 367.

6. An argumentative denial, though in form an affirmative plea, is not sufficient to entitle the defendant to begin.

Bradley v. Clark, 1 Cush. (Mass.) 293; Rothrock v. Perkinson, 61 Ind. 69.

Thus, in an action of replevin, an answer of property in the defendant amounts to a mere argumentative denial, and the plaintiff is entitled to the open and close. Turner v. Cool, 23 Ind. 56.

7. It is sufficient if the defendant admits all the *material* allegations; for immaterial allegations, in the complaint, not necessary to be proved by the plaintiff, need not be admitted by the defendant to entitle him to the opening.

Millard v. Thorn, 56 N. Y. 402; Murray v. New York &c. Co., 85 N. Y. 236; List v. Kortpeter, 26 Ind. 27. But the admission must be broad enough to dispense with all evidence on the part of the plaintiff. Starnes v. Schofield, 5 Ind. App. 4, 31 N. E. 480; McConnell v. Kitchens, 20 S. Car. 430, 47 Am. 485; 1 Elliott Ev., § 136.

8. Although the defendant should admit all the material allegations of the complaint, and set up an affirmative defense, yet if the plaintiff by reply, or unqualified admission at the trial, concedes all the facts constituting the defense he is entitled to begin.

Hall v. Weare, 92 U. S. 728, 738, 23 L. ed. 509; Love v. Dickerson, 85 N. Car. 5; Viele v. Germania Ins. Co., 26 Iowa 9; Mann v. Scott, 32 Ark. 593, 596; Richards v. Nixon, 20 Pa. St. 19.

9. Error in refusing the right to begin is not cured by permitting the partly claiming it to make the closing address.

Penryhn Slate Co. v. Meyer, 8 Daly (N. Y.) 61.

10. Failure on the part of the defendant to offer evidence will not deprive the plaintiff of the right to open and close the argument.

Worsham v. Goar, 4 Port. (Ala.) 441.

11. In strictness, where the plaintiff waives the opening argument, the defendant obtains the right to close, and if the plaintiff be permitted to close he should at least be confined to a strict reply to the defendant's argument.

Brown v. Swineford, 44 Wis. 282, 290.

12. Where the defendant, after plaintiff's argument, submits the cause without argument on his part, it would seem that the plaintiff is not entitled, at least as a matter of right in ordinary cases, to make further argument.

Tyre v. Morris, 5 Houst. (Del.) 3. See also, Conrad v. Cleveland &c. R. R. Co., 34 Ind. App. 133, 72 N. E. 489. But it is held not an abuse of discretion for the trial court to permit the plaintiff to do so. Citizens St. R. Co. v. Huffer, 26 Ind. App. 575, 60 N. E. 316.

13. There are many special proceedings where it is difficult to determine which party occupies the position of plaintiff and which that of defendant. In such cases, unless otherwise provided by statute, the right to open and close belongs, as a rule, "to the party who seeks to alter the existing state of things."

See "The Right to Begin and Reply in Special Proceedings," 25 Cent. L. J. 459-483, where many illustrative cases are cited and reviewed by Judge Seymour D. Thompson. See also, 1 Elliott's Ev., § 139; 4 Wig. Ev., § 2500, *et seq.*

CHAPTER IV.

THE STATEMENT OF THE CASE.

"A statement of a case is a narrative to inform the auditor what the matter in question is."

"A case ought to be opened leaf by leaf, as a rose unfolds."—*Judge Dillon.*

"The counsel whose duty it is to make the opening for his side of the case should have a clear theory of that case; a theory around which he should group all the facts which he admits as established for the other side, and those which he relies on as proved by his own."—*Judge Samuel F. Miller.*

Practical Suggestions.

First impressions are always important. Men are slow to yield one impression and accept another. Where an impression has once been made another can find an abiding place only by dislodging it. If the one impression is dislodged, that which takes its place is very like to be confused and obscure, for the first and last are apt to blend. A photographer who should attempt to take a picture upon a plate on which traces of another picture still remain, even though in shadowy outline, could not secure a clear and distinct likeness. If one should attempt to imprint a seal on wax already impressed by another seal, he would get, at best, but an obscure and indistinct impression. As it happens in such cases, so often it happens in the human mind; hence, it is reasonable to conclude that, where an impression is to be made, it must be made clear and strong by the earliest words, and where one is to be removed it must be done while it is yet fresh, and by a power that will completely displace it.

With length of time, impressions which ripen into mental judgments strengthen and deepen; their roots go deeper and

take stronger hold as the mind dwells upon them. It is, therefore, obvious that the statement of the case, both for the plaintiff and for the defendant, is a work requiring skill and power.[1]

A writer in one of our law periodicals justly says: "Generally speaking, a case well opened is half won. It is the opening speech that gives the cue to the jury. Throughout the course of the evidence, they follow the lines then given them."[2] Justice Miller, of the Supreme Court of the United States, regards the opening statement as of greater importance than the closing argument, for his opinion is that it is, in effect, "choosing the ground where the battle shall be fought."[3] But it is not safe to assume that there can be such a choice, for a wary antagonist—and such it must be presumed will be encountered—may stoutly and successfully contest the choice, so that it is necessary to be prepared to fight on any ground that the movements of the conflict may make the real field of battle. Much may be done in every case to fix the battleground, but it is not every case, by any means, where one party alone will have it of his own choosing. If, however, the advocate cannot always select the battlefield, he can, at least, prevent his adversary from having his free choice. It is, therefore, important at the outset to carefully mark out the lines where the main contest shall take place, and to keep as nearly within them as it is possible for human power and will to do.

The opening statement, while it should be brief, should yet be copious enough to lay before the jury the lines of the theory.[4] These lines, if the figure be not overbold, are the highways along which their thoughts must travel. If their thoughts can be drawn into highways laid out straight and plain, they will

[1] Judge Dillon says: "Not one lawyer in twenty can state a case neatly, logically, compactly." Rhetoric as an Art of Persuasion, 28.

[2] 23 Central Law J. 223.

[3] Rhetoric as an Art of Persuasion, 40.

[4] In England it is customary to make longer opening statements than in this country. For good examples of opening statements under the English practice, see that of Mr. Subtle in Warren's Ten Thousand a Year, Chap. XIII, and that of Sir Alexander Coburn in Palmer's trial, Harris' Hints on Advocacy, Chap. XIII.

leave them with reluctance, but continue in them with pleasure. Men's thoughts delight in smooth roads, and dislike rough lines as much as the traveler does holes, logs and stones in the path along which he must make his way. The writer from whom we have already quoted says: "We all know that in an argument upon any subject whatever, if we first start off with the theory, and then undertake to prove it, we find the task of making the proof sufficient a comparatively easy one, and one to which we are, as it were, committed; whilst if we reverse the process, and, beginning with the proof, endeavor afterwards to construct the theory, we are very likely to reject the theory as not sufficiently proven. In the latter case, our critical faculties are first excited, and it is more congenial to our minds to detect flaws in the chain of proof than to accept it as complete; whilst in the former case our love of system and harmony is first called into play, our mental powers are engaged in support of our proposition, and we are not easily induced to examine too closely the evidence upon which we are acting. This is exactly the feeling of the average juror, and if, at the very beginning, he clearly understands what is the litigant's case, he will retain to the end of the trial an unconscious bias in favor of that case being proved."[5] Possibly the writer speaks somewhat more strongly than experience will justify, but, if he has gone astray at all, he is, at all events, not far from the true path. If to his premises be added that the minds of the jurors are strongly impressed with the belief that the case stated to them is a just one, then his conclusion will be unquestionably the correct one. If the jurors can be made to understand the case, to see in advance the lines upon which it will move, and that it is just, they will not surrender their preconceived views without a struggle. What agrees with these views will be heartily seized as true; what differs will be rejected as false, unless it comes with such force that conviction is almost inevitable.

The great judge from whom we have quoted says that, "To enable the judge or jury to understand fully, and appreciate correctly, the force and value of the more elaborate argument it

[5] 23 Cent. Law J. 224.

is necessary, in the first instance, to give a clear view of the aspect of the case, of the matter to be decided, and of the elements of which that decision must be composed. The object is not successfully attained either by the announcement that certain abstract questions of law are necessary to be decided in the judgment to be rendered, nor that certain items of evidence will be introduced."[6] There is a great deal of practical wisdom in this advice, for the statement must be something more than a mere outline. If it is not full and clear enough to inform the jury of the case which they are to pass upon, it will fail to accomplish its purpose. It is not necessary, however, that all the details of the case should be stated, for evil, rather than good, will be done by overlaying the statement with details. Justice Miller, from whom we again borrow thoughts, as well as words, says: "The propositions of law and fact on which counsel rely must be stated so as to show clearly their relation to each other, and be so plainly expressed as to present a chart of the road to be traveled, without a map in detail of the country through which that road is to go."[7]

Mr. Chitty and other authors caution counsel against giving any hint in the opening statement that may suggest to the court or to the opposing counsel an objection to his case which did not occur to them. This caution is well enough, but if counsel in stating his case keeps fully in mind the great object of the statement he will hardly err in this respect. The leading purpose of the statement is to create in the minds of the jury, at the very threshold, a favorable opinion of the cause. It is not expected that anything of an unfavorable character will be there mentioned, nor is there anything unfair in this, for the statement professes only to state one side of the case. It is, indeed, sometimes expedient to avow that it is the statement of one side only of the case, since that will prevent any charge of want of fairness or candor. It is, however, better, as a general rule, to state

[6] Rhetoric as an Art of Persuasion, 39.
[7] Ibid, 40.

only the case the advocate represents,[8] leaving opposing counsel to state their own case, although there are cases where defenses must be anticipated and their force broken. This course is especially necessary where it is expected that the character of the defense will be such as to appeal to the sympathies or to the passions and prejudices of the jury. But even in such cases great care should be taken not to give too much prominence to the principal features of the defense. There can hardly be a greater mistake than that of covering or hiding the points of a case by stating points favorable to the adversary. From first to last the complexion of the statement should be favorable to the client in whose behalf it is made. When, however, as is sometimes the case, it is necessary to state matters favorable to the adverse party, it should be done fairly and candidly, but these matters should never be allowed to hide the facts favorable to the client in whose behalf the advocate pleads. The facts of that side must always be prominently in the foreground, and so displayed that they seem naturally, and almost as a matter of course, to entitle the client to a verdict.

An English author directs the advocate to take great pains to state each question of law and of fact fully, and to repeat it whenever the evidence bearing upon it is stated. This advice is followed by this language: "Then, taking each of these questions in turn, state in the form of narrative the proofs you propose to produce in order to its establishment; and in so doing be very careful to show no misgivings about it by anticipating objections, apologizing for defects, or making an effort to give weight to certain witnesses, for you must assume that they are unimpeachable until they are shaken by your opponents, and their testimony to be conclusive until it is shown to be otherwise."[9] This advice is of more value to the English than to the American advocate, but it is by no means without value to the

[8] See also, Elwell v. Chamberlain, 31 N. Y. 611, 614; Baker v. State, 69 Wis. 32, 33 N. W. 52.

[9] Cox's Advocate, 339; Ram on Facts (3d Am. ed.), Appendix, 363. Quoted also, in part, in Hardwick's Art of Winning Cases, 51-76, and Munson's Manual of Elementary Practice, 299-301.

latter. What the author says respecting the framing of questions and arranging the evidence under them in due order will apply to all complex cases, but will be unnecessary in simple ones. Nor do we think it expedient to repeat the questions, for this not only adds to the length of the statement, but it also gives to it a labored appearance, which is very likely to detract from its effectiveness. An opening statement ought not to appear to be an elaborate production; it should seem to be a plain and simple narrative, constructed for the purpose of conveying information to the court and jury. It will, no doubt, cost much labor in an intricate case to construct such a statement, but the labor should not be visible. Nor do we agree that it is best to assume, in all cases, that a witness is unimpeachable, for there are many cases where it is better to frankly concede the weakness of his reputation; but show that his story is corroborated, or has such strong intrinsic marks of truth as to be trustworthy. It is wiser to frankly avow the infirmity in the testimony rather than to permit the jury to infer that you were deceived; and it would be sheer folly to take such a course as would lead them to believe that you had attempted to impose upon them by bringing an unworthy witness before them. Of course, there will be no such avowal unless it is clear that the reputation of the witness can be successfully assailed, for, unless quite sure of this, the true course is to fight for him until the last, and this one may hope to do, since there are comparatively few men who cannot find some one to testify in support of their reputation. The author is, in our opinion, clearly right in advising that no "misgivings" be shown, and for this reason no argument should be suffered to enter into the opening statement.

Mr. Harris[10] cautions the advocate against "arguing too soon," and the caution should be heeded, because an argument implies that the case needs props and supports not supplied by the facts. But, while a formal argument should not constitute any part of the opening statement, it is sometimes expedient to suggest one by a question, or to insinuate one by an apparently careless state-

[10] Hints on Advocacy, 7.

ment, made as if it came up by the way.[11] Anything that indicates a lack of confidence is mischievous; but while there should be no betrayal of a lack of confidence, there should, on the other hand, be no arrogance or effrontery. "Confidence," as Quintilian wisely says, "often suffers from being thought to partake of presumption."[12]

Perspicuity and plainness are among the chief virtues of the opening statement. If the advocate cannot make clear at the outset the main features of his case, he is likely to find himself in a sad plight, for each movement of the case adds a new complication, and the confusion deepens as the case nears the end. Speaking of the evil likely to result from a confused statement, Professor Washburne says: "If the counsel is confused at the start, the jury find themselves in the same dilemma, and the labor of unveiling and explaining" the merits of the case "is greatly enhanced, if not rendered impossible."[13]

In order to secure clearness, the method adopted must be such as will array the facts in orderly succession, and avoid perplexing partitions. Nothing so much impairs the perspicuity of a statement as divisions and subdivisions crossing and recrossing each other in a maze of confusion. The method must lay out a straight road to a known point, and not a winding path leading hither and thither, without any known destination in view. A straight road can be secured by an orderly arrangement of facts, and of this arrangement the basis must be the principle of unity.

Plainness is a virtue, because it gives the statement the appearance of an unlabored and straightforward story. Ornament and embellishment betray the marks of labor, and their presence is apt to impress the hearers with the belief that the speaker is laying before them the products of his imagination, and not the facts held in his memory. It is, indeed, a violation of good taste to

[11] Quintilian says: "Continued argumentation, as I observed, we must never use in our statement of facts, though we may introduce a single argument occasionally." Inst., Book IV, Chap. II, § 103.

[12] Inst., Book V, Chap. I, § 33.

[13] Study and Practice of the Law, 181.

mingle the statements of cold facts with the ornaments of rhetoric, but it is not so much for this reason that mere ornaments are to be rigorously excluded from the opening statement. The solid reason is, that the introduction of rhetorical embellishments arouses a suspicion that the case is too weak to stand upon its own facts. The nearer the statement can be made to impress each juror with the belief that he could have made it himself the better and stronger it is. It is no easy task to construct such a statement; it is, indeed, the very perfection of art. Quintilian discusses this subject with great acuteness, and declares that "some advocates consider that to state a matter calmly belongs to every-day conversation, and is in the power of even the most illiterate, while, in truth, it is uncertain whether they will not or cannot perform that of which they express such easy contempt. For if they try every department of eloquence, they will find nothing more difficult than to say what every one, when he has heard it, thinks he himself would have said, and for this reason he does not contemplate it as said with ability, but with truth; but it is when an orator is thought to speak with truth that he speaks best."[14] The opening statement has in it no place for display, and any attempt of that kind is a positive blemish, not merely disfiguring it as a work of art and offending good taste, but rendering it powerless to accomplish any good for the client. Clear words and strong words must be its texture. Lord Abinger says of his own practice that he made "it his business to open the case in the shortest and plainest manner, with no other object in view than that to make the jury comprehend the evidence which they would shortly hear." But plainness by no means requires the use of familiar or worn-out expressions, nor does it require that the statement shall be dull and prosy; on the contrary, the brighter and more vivacious the language, the keener the attention of the jurors; and the more forcible the diction, the longer is that attention kept from flagging.

The thing to do, and the thing that must be done, is to arouse the attention of the jury and excite an interest in the case. Cicero says: "We shall render our hearers willing to receive information

[14] Inst., Book IV, Chap. II.

if we explain the sum total of the case with plainness and brevity, that is to say, the point on which the dispute hinges. For when you wish to make a hearer inclined to receive information you must also render him attentive. For he is, above all men, willing to receive information who is prepared to listen with the greatest attention."[15] Quintilian, in not very different language, gives similar advice, "for," he says, "the object of the statement is effected principally by three means: by securing good will and attention, and by rendering the hearer desirous of further information."[16] It is not by long statements, giving the evidence in detail, that either of the two objects deemed so important by these great authors is to be attained; on the contrary, a long and overcrowded statement defeats the purpose it is intended to accomplish, for it dulls the perceptive faculties and wearies the attention. It is not to be expected that at the outset the minds of jurors are aroused and eager for the details; that condition of the mind may come later, but at the start they care only for information upon the general features of the case which invokes their judgment. If the statement can arouse their minds, and make them desirous of hearing further information, it will do far more good than one which creates an impression that all has been heard that is worth the hearing. A statement that makes the jurors anxious and expectant will do effective work, but a statement that is so overlaid with details as to appear to leave nothing more to be learned is almost as bad as no statement at all.

Aristotle says: "It is also pleasant to put a finish to what is deficient, for it becomes by that time one's own production."[17] Not very different is the opinion of Pascal, who writes: "We are more forcibly persuaded in general by the reasons we ourselves discover than those that come from the minds of others."[18] A man of at least equal practical sagacity, if a less acute thinker, Lord Abinger, says: "All men are more or less vain, and every man gives himself credit for a great deal of discernment. He

[15] Rhetorical Invention, XVI.
[16] Inst., Book IV, Chap. I.
[17] Rhetoric and Poetics, Chap. XI, p. 26.
[18] Pascal's Thoughts, Chap. IV, § 10. See also, Ram on Facts, 265.

loves to find out things for himself; to guess the answer to a riddle better than to be told it." This tendency of the human mind makes a suggestive statement better than one so filled with details as to leave the jurors nothing to discover for themselves. A statement which supplies the groundwork for the jurors to build upon, leaving it to them "to finish what is deficient," inspires them with the belief that the completed production is their own. An occurrence so described as to seem to require an explanation impresses itself upon the minds of the jurors, because it straightway sets them to work to find some satisfactory, or, at least, some plausible, explanation. An impression thus produced will stand many an assault before it will yield, if, indeed, it will yield at all. It will not do, however, to leave the matter so obscure as to cause the jurors to turn from the task of finding it because of the work it imposes, nor, on the other hand, will it do to make it seem too obvious, lest the jurors regard it as trivial and treat it as a reflection upon their intelligence. An occurrence, or a fact, thus fixed in the mind should have grouped about it other material facts which it is important for the jury to keep in memory, for one fact of a train rising in memory will cause the associated facts to follow in an unbroken procession.

A caution given by authors generally, is, never to overstate the evidence. Clearly right as this rule is, few are more often violated. Advocates very frequently exaggerate, and the result is generally disastrous, for jurors are quick to resent what they conceive to be an attempt to deceive them. Not only this, but they are very apt to think that all that is stated must be proved or else no case can be made out, and when the proof falls short of the statement they are quite likely to conclude that the advocate has no case. There is yet another reason supporting this rule, and that is this: where the evidence is stronger than the statement, the advocate secures credit for modesty and candor, and these are great virtues in the eyes of the jurors. It is never to be forgotten in stating the facts that keen and hostile eyes are watching, and that an unrelenting enemy is on the alert ready and eager to expose the least misstatement or mistake. It may be that the Roman priests were, as it is said they were, able to deceive Jupiter by

chalking over the dark spots of the sacrificial bull; but, if they were, he was not so keen-eyed as an opposing counsel is likely to be, for chalking dark spots in a statement of facts will not deceive him. Fictions will not supply the place of facts.

RULES OF LAW.

1. The opening of counsel should ordinarily consist of a comparatively brief statement of the nature of the action, the substance of the pleadings, the issues to be tried, and the facts expected to be established by the evidence.

Ayrault v. Chamberlain, 33 Barb. (N. Y.) 229; 2 Abbott's Law Dict. 210, title, "Open"; 3 Bouv. Inst. 333, § 3049; 1 Burrill's Pr. 234; Broom's Com. 221.

It may sometimes be proper and expedient to state the law, also, especially in criminal cases, where the jury are the judges of the law, as well as the facts. Whart. Crim. Pl. and Pr. (8th ed.), §§ 551, 562, 563.

2. Counsel should not be permitted to rehearse the evidence at length, but should be confined to a statement of the facts, and only such facts, as a rule, as may fairly be shown under the issues.

Scripps v. Reilly, 35 Mich. 371, 24 Am. 575, opinion 581, 582. See also, observations of Baron Pollock in Darby v. Ousley, 36 Eng. L. and Eq. 518-525; 1 Waite's Pr., 114; 2 Best's Ev., § 640; Pietsch v. Pietsch (Ill.), 71 Cent. Law Jour., 81, 82; 1 Thomp, Tr., §§ 263, 264, 267, 268.

Thus, plaintiff's counsel is not entitled in a criminal case to comment, in opening, on the bad character of the defendant, because he cannot show the defendant's bad character in the first instance. McLain v. State, 18 Neb. 154, 24 N. W. 720-724.

3. The limitation and regulation of the opening statement must rest largely in the discretion of the trial court, subject, however, to the revisory power of the higher court for abuse thereof.

Porter v. Throop, 47 Mich. 313, 11 N. W. 174; Ayrault v. Chamberlain, 33 Barb. (N. Y.) 229. See also, Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711, and note 68.

4. Where counsel exceeds the proper limits in opening, an objection should be made, and an exception taken to the ruling of the trial court, in order to present the matter on appeal.

McLain v. State, 18 Neb. 154, 24 N. W. 720; Price v. Commonwealth, 77 Va. 393; Gilooley v. State, 58 Ind. 182.

5. Counsel, in his opening statement, should be careful to base his action or defense on a tenable theory, and to state his entire claim.

3 Bouv. Inst. 333, § 3049; Penson v. Lee, 2 B. & P. 332; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. ed. 539.

In some jurisdictions, if the theory developed in the opening is clearly untenable, or if such admissions are made as would justify a verdict in favor of the opposite party, the court may, on motion, dismiss the proceeding, or direct a verdict without hearing the evidence. See Oscanyan v. Arms Co., 103 U. S. 261, 26 L. ed. 539; Ward v. Jewett, 4 Robt. (N. Y.) 714; Crisup v. Grosslight, 79 Mich. 380, 44 N. W. 621; Clews v. Bank, 105 N. Y. 398, 11 N. E. 814.

Contra, Smith v. Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804. And see Nearing v. Bell, 5 Hill (N. Y.) 291; Sawyer v. Chambers, 43 Barb. (N. Y.) 622; Pietsch v. Pietsch (Ill.), 71 Cent. Law Jour. 81, and note.

The defendant has a right to require that the opening argument should indicate to him what he is expected to meet. Barden v. Briscoe, 36 Mich. 254.

CHAPTER V.

THE INSTRUMENTS OF EVIDENCE.

"A witness is a means or instrument of evidence."—*Stewart Rapalje.*

"In our own law the term 'instrument' has the same wide signification, including whatever may be presented as evidence to the senses of the adjudicating tribunal."—*Francis Wharton.*

"Evidence, in order to be receivable, should come through proper instruments, and be in general original and proximate."—*Best.*

"An advocate is expected to come prepared with a knowledge of all the rules and principles of evidence."—*E. W. Cox.*

"A deposition is evidence given by a witness under interrogatories, oral or written."—*Judge Samuel R. Betts.*

Practical Suggestions.

Where issues of fact are joined between opposing parties, evidence is required. This evidence must be placed before the court and jury by proper instruments, and in accordance with the rules of law. One might as well be without evidence as without the instruments or means of presenting it to the tribunal which it is hoped to convince or persuade. Not only, therefore, must the advocate be prepared with evidence, but he must also be prepared with the instruments for conveying it to the triers of his cause.

In many instances there is no choice; the very best instruments attainable must be employed. Thus, where the contract of the parties has been reduced to writing, the instrument, and the only instrument which can be employed, to communicate the evidence to the court, is in the writing itself. The operation of this rule may in many cases be avoided, as, for instance, where the instrument has been lost or destroyed, or is in the hands of the adverse party, or in the hands of a person beyond the reach of the court.

If the instrument cannot be obtained, then it is necessary to proceed, as the law provides, to substitute some other instrument of evidence. It is not to be forgotten that the best instrument must be obtained and used if care and diligence can secure it, and that it is only where the best cannot be secured by care and diligence that an inferior instrument will be accepted. This care and diligence consists in doing, at the proper time and in the proper method, what the law requires. He who proposes to employ an inferior instrument will do well to make sure that he is prepared to show that nothing more could reasonably be done to secure the best.

There is sometimes a choice between the instruments of evidence. Thus, where several persons have seen an occurrence, and of the several some are good and some are bad, choice may be made of the good to the exclusion of the bad. A few good witnesses, intelligent, frank, well-mannered, and of good repute, are better than many, if of the many a considerable number are bad. In proving reputation, it is of great importance that the best witnesses at command be obtained, and this is true where reputation is assailed. But the instance we have given is by no means the only one in which it is of importance to secure the best witnesses, although, perhaps, in cases which it represents the importance of securing the very best witnesses is greater in degree than in ordinary cases.

Whether a person can be used as an instrument of evidence depends upon whether he is a competent witness in the particular case. If he is not competent in that case, then he is not an instrument of evidence. A person may be unworthy of credit and yet be competent; in that event he is an instrument of evidence, although not an effective one. It is necessary, therefore, to ascertain in advance of the trial whether the witness is, or is not, competent; for, if he is not, he cannot be employed as a means of communicating facts to the court, and a careful advocate would search elsewhere for an effective instrument.

Dr. Wharton says: "A witness in a civil case (the practice being otherwise in criminal) is entitled to have due notice in order to refresh his memory and arrange his business so as to enable

him to testify; and hence, if called upon without notice upon his happening to be in the court, he is ordinarily entitled to decline on the ground that he was not served with a subpœna."[1] Without stopping to inquire whether the statement made by the learned author is strictly correct, and risking a departure from a strict logical method, we commend it as worthy of attention for the suggestion it contains, and that is, that the memory of the witness should have time to fully recall the event or occurrence of which he is expected to give testimony. As the witness is the instrument in the hands of the advocate, it is obvious that the better he is fitted for the purpose for which he is to be used the more effective will be the work he will enable the advocate to accomplish. If the advocate does not give timely notice as the law requires, he will be in fault, and can censure only himself if his fault mars his work in court.

Where there is reason to suspect collusion among the witnesses of the adversary, or where there is cause for believing that their evidence is fabricated, it is well to secure an order separating them, so that they may not hear each other's testimony. If, however, there is reason to believe that there is no collusion, and that the testimony is not fabricated, it is better not to ask an order for the separation of the witnesses. If they are honest, and their testimony agrees on material points, it will have all the more force because they have not heard others testify. There is another matter to be considered before deciding to ask the order, and that is this: the party who asks the order is very likely to be suspected of having provided in advance for such a course by drilling his own witnesses. It is true this is not a very weighty reason, but in close cases all reasons have force.

It is better, as we have elsewhere shown, to bring the witnesses into the presence of the jury, but this cannot always be done. It is often necessary to take the testimony of witnesses in the form of depositions. Where depositions of material witnesses are to be taken the prudent course is, where practicable and not forbidden, for the advocate to attend the examination in person, or to secure the attendance of counsel fully informed as to the

[1] Wharton's Evidence (3d ed.), § 377.

issues, the material points of the case, and the facts of which the witness is supposed to have knowledge. It is not always easy to frame a series of questions that will fully elicit the facts, nor, indeed, is it easy to prepare questions that are not liable to mislead or confuse the witness. If an examining counsel is present errors may be corrected, obscurities removed, plain questions substituted for obscure ones, and the testimony be brought out with much more force and clearness than by written questions.

It is of more importance than many suppose that a deposition should be read to the jury forcibly and distinctly. If the witness cannot be present, the next best thing is to have his words reproduced with vigor and earnestness. Many depositions have been stripped of much of their force by blundering readers halting and stumbling through them. There are others who destroy, or at least impair, the effect of depositions by reading them with a parade and an emphasis that engender suspicion. Here, as elsewhere, naturalness is the supreme quality; but one may be natural without being listless, and without running through a deposition as a stupid schoolboy runs through a reading lesson he has not studied.

An adverse witness may be weakened in various ways. One of these methods is by impeachment, and that is the only method we speak of at present. The rules of law designed for the protection of witnesses are quite strict, and the advocate who expects to break down a witness by impeachment must be prepared to pursue the line of examination the law requires. If the plan is to impeach a witness by proof of contradictory statements made out of court, the foundation must be carefully laid as the law requires. If the attack is upon the reputation, then the questions must be expressed in the approved legal form. The rules of law so fully cover the ground that in making practical suggestions little more can be done than to give, as we have done, a word of caution.

The instruments of evidence are sometimes real things, as models, machines, apparel, weapons and the like.[2] These are the

[2] In a late edition of the autobiography of Roger North, a case is referred to in which there appeared in court as part of the "real evidence" several specimens of brandy, and among those present was a barrister, of enormous

instruments of "real evidence," and they are very serviceable if the advocate so thoroughly understands their nature and use as to be able to clearly and strongly instruct and inform the jury. But for the fact that we have more than once seen these instruments of evidence turned with telling force against the advocate who brought them into court, we should deem it needless to caution one who employs such instruments to be sure that he thoroughly understands their construction and their use. "Real evidence" is, it is obvious, of the highest probative force when skilfully used, but in the hands of a blunderer it is oftentimes a very dangerous species of evidence. Many of the ablest advocates have given days of study to instruments of real evidence, and no prudent man will make use of this kind of evidence unless he knows that he can secure good from it without the risk of harm.

bulk and much given to drink, named Saunders. "The judges tasted, the jury tasted, and Saunders, seeing the vials moving, took one and set it to his mouth and drank it all off. The court, observing a pause and some merriment at the bar about Mr. Saunders, called to Jeffries (one of the counsel in the case) to go on with his evidence. 'My lord,' said he, 'we are at a full stop and can go no further.' 'What's the matter?' said the chief. Jeffries replied: 'Mr. Saunders has drank up all our evidence.'" In Hale's Pleas of the Crown, 635 will be found a case strikingly illustrative of the probative value and force of real evidence. See also, Rex. v. Vaughan, 13 How. St. Tr. 517, stated in 2 Elliott Ev., § 1221, note 6. Professor Wigmore calls the production or exhibition of such matters "autoptic proference."

RULES OF LAW.

The Best Evidence, and the Method of Dispensing with its Production.

1. Primary evidence is the best of which the case will in its nature admit, or, in other words, such as carries on its face no indication that there is evidence better in quality. All other evidence is secondary.

Tayloe v. Riggs, 1 Peters (U. S.) 591, 7 L. ed. 275; Richardson v. Milburn, 17 Md. 67; Brown v. Woodman, 6 C. & P. 296; 1 Elliott Ev., §§ 208, 209.

2. Written documents are the best evidence of their contents and must speak for themselves.

Williams v. Jones, 12 Ind. 561; Sibree v. Dorr, 9 Wheat. (U. S.) 558, 6 L. ed. 160; Louisville &c. R. Co. v. Orr, 94 Ala. 602, 10 So. 167; Perrin v. State, 81 Wis. 135, 50 N. W. 516; note to Ferguson v. Rafferty, 6 L. R. A. 33.

3. Instruments signed in duplicate are both original.

Totten v. Buey, 57 Md. 446. But letter-press copies are not. Anglo-American &c. Co. v. Cannon, 31 Fed. 313; Foot v. Bentley, 44 N. Y. 166; Traber v. Hicks, 131 Mo. 180, 32 S. W. 1145. See, however, as to carbon copies, Cole v. Ellwood &c. Co., 216 Pa. 283, 65 Atl. 678; International Harvester Co. v. Elfstrom, 101 Minn. 263, 112 N. W. 252.

Telegrams are written instruments within the meaning of the rule. United States v. Babcock, 3 Dill. (U. S.) (C. C.) 576; Hawley v. Whipple, 48 N. H. 487; Blair v. Brown, 116 N. Car. 631, 21 S. E. 434; Lanland v. Green, 20 Wis. 431; Anglo-American &c. Co. v. Cannon, 31 Fed. 313. So are maps, letters, hand-bills and the like. Pools v. Meyers, 21 Miss. 466; Guerren v. Hunt, 6 Minn. 375; Hanson v. Armstrong, 22 Ill. 442. See also, 1 Elliott Ev., § 208; 2 Elliott Ev., § 1255.

4. Where the items of an account are very numerous, and the calculations intricate, a qualified witness may, with the books before him, give a summary of the calculations.

Burton v. Driggs, 20 Wall. (U. S.) 125, 22 L. ed. 299; Home Ins. Co. v. Baltimore &c. Co., 93 U. S. 527, 23 L. ed. 868; Von Sachs v. Kretz, 72 N. Y. 548; Stephens' Ev., Art. 71; 1 Greenl. Ev., § 93; Taylor's Ev., § 432; 1 Elliott Ev., § 210.

5. Certified copies of instruments and records are admissible when the law authorizes the registering or recording.

Hunt v. Order of Chosen Friends, 64 Mich. 671, 31 N. W. 576; Wells, Fargo & Co. v. Davis, 105 N. Y. 670, 12 N. E. 42; Blanchard v. Young, 11 Cush. (Mass.) 345; Hammond v. Johnson, 93 Mo. 198, 6 S. W. 83. *Compare* Russell v. Glasser, 93 Mo. 353, 6 S. W. 362.

6. Inscriptions on tombstones, walls, buildings, or other immovables, may be proved by oral testimony.

Bartholomew v. Stephens, 8 C. & P. 728; 1 Greenl. Ev., § 94.

This rule does not apply to placards or the like temporarily fastened to an immovable thing. Jones v. Tarleton, 9 M. & W. 675.

7. Parol evidence may be given of the contents of a written instrument in six cases:

First. Where the paper is not within the jurisdiction of the court, or within reach of its process.

Burton v. Driggs, 20 Wall. (U. S.) 125-134, 22 L. ed. 299; Otto v. Trump, 115 Pa. St. 425, 8 Atl. 786; Rex v. Johnson, 7 East 66; Shepherd v. Giddings, 22 Conn. 282; Smith v. Traders' Nat. Bank, 82 Tex. 368, 17 S. W. 779. But see Wiseman v. Northern Pac. R. Co., 20 Ore. 425, 26 Pac. 272.

Second. Where its production is physically impossible, or is in the highest degree inconvenient.

Rex. v. Hunt, 3 B. & C. 566; Mortimer v. McCollum, 6 M. & W. 68; Report of Committee to British Parliament (Burke's works), vol 6, p. 477, *et seq.* See also, 1 Elliott Ev., § 210.

If claimed to have been lost a search must be shown. Anglo-American &c. Co. v. Cannon, 31 Fed. 313. See also, Gordon v. State, 48 N. J. 611, 7 Atl. 476, and note.

Third. Where the document is in the hands of the opposite party, who fails, on due notice, to produce it.

State v. Lockwood, 5 Blackf. (Ind.) 145; United States v. Winchester, 2 McLean (U. S.) 135; Portier v. Barclay, 15 Ala. 439; Suburban R. Co. v. Balkwill, 195 Ill. 535, 63 N. E. 389. See also, Scott v. Christenson, 49 Ore. 223, 89 Pac. 376, 124 Am. St. 1041.

Fourth. Where it is in the hands of a stranger, who cannot be compelled by legal authority to produce it, and he declines, after service of proper process, to produce it.

Roscoe's Crim Ev. 11; Taylor's Ev. 407; Mills v. Oddy, 6 C. & P. 728; Harvey v. Edens, 69 Tex. 420, 6 S. W. 306. See also, Bullis v. Easton, 96 Iowa 513, 65 N. W. 395; Bishop v. American &c. Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. 317.

Fifth. Where the documents are very voluminous, and all that is essential is a summary or calculation.

Meyer v. Sefton, 2 Starkie 274. See also, Culver v. Marks, 122 Ind. 554, 566, 23 N. E. 1086; Von Sacks v. Kretz, 72 N. Y. 548; Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528; New La Junta &c. Co. v. Kreybill, 17 Colo. App. 26, 67 Pac. 1026, 1029.

Sixth. Where the document is brought to notice on the examination of a witness on his *voir dire.*

Rex. v. Gresham, 15 East 57; Butchers' Co. v. Jones, 1 Esp. 160; Miller v. Mariners' Church, 7 Me. 51. But see, Scarborough v. Reynolds, 12 Ala. 252; Horth v. Moulton, 21 N. H. 586.

Notice to Produce Documents.

1. When a document is in the possession or control of the adverse party notice to produce should be served upon him, or his attorney, a reasonable time before trial.

Jefford v. Ringgold, 6 Ala. 544; Shreve v. Dulaney, 1 Cr. (C. C.) (U. S.) 499; Cady v. Hough, 20 Ill. 43; Durkee v. Leland, 4 Vt. 612; 1 Wharton's Evidence (3d ed.), § 152. An order of court is also required under some statutes.

The notice should describe the document called for with reasonable certainty. Bogart v. Brown, 5 Pick. (Mass.) 18; United States v. Duffy, 6 Fed. 45; Taylor on Evidence, § 413; 1 Wharton's Evidence (3d ed.), § 154n. For notice held sufficient in this respect, see Home Ins. Co. v. Overturf, 35 Ind. App. 361, 74 N. E. 47.

2. It is safest to give the notice in writing;[1] but a verbal notice has been held sufficient in the absence of a statute requiring it to be in writing.[2]

[1] Cummings v. McKinney, 5 Ill. 57.

[2] Houseman v. Roberts, 5 C. & P. 394; Cates v. Winter, 3 T. R. 306. The whole matter is often regulated by statute.

3. It is better to serve the notice directly upon the party or his attorney, but it has been held sufficient where left with a com-

petent agent or servant either at the attorney's office or at the party's dwelling.

Doe v. Martin, 1 M. & R. 242; Evans v. Swett, R. & M. 83; Woods' Pr. Ev., 25.

Competency of Witnesses.

1. Incompetency of a witness will not be presumed, and where a witness is objected to as incompetent, if the facts on which the objection is based are disputed, the judge must determine his competency; and that this may be done intelligently the witness may be, and usually is, examined on his *voir dire,* or other evidence may be heard by the judge to contradict him and show his incompetency.

1 Best's Ev., § 133; Bartlett v. Smith, 11 M. & W. 483; 3 Bouv. Inst., § 3202; 1 Greenl. Ev., § 425; 2 Elliott Ev., §§ 722, 807.

In cases of doubt, however, it seems that courts are disposed to receive the witness and let the jury judge of his credibility. 1 Best's Ev., § 133; *Ib.,* § 144.

And on principle, and, perhaps, upon authority, when a party who objects to a witness as incompetent chooses to examine him upon his *voir dire,* he can not, as a matter of right, contradict him by other evidence. 3 Bouv. Inst., § 3202. And see Stebbins v. Sackett, 5 Conn. 258, 261; 1 Greenl. Ev., § 423; Rapalje's Law of Witnesses, § 175. See also, 2 Elliott Ev., § 722.

2. The party objecting usually has the right to begin the preliminary examination as to competency, and the other party may cross-examine.

3 Bouv. Inst., § 3202.

Objection to the competency of a witness should, if the grounds of the objection are known, be made before the commencement of his examination in chief. Lewis v. Morse, 20 Conn. 211; Kingsbury v. Buchanan, 11 Iowa 387; Stuart v. Lake, 33 Me. 87; Gresham v. Thomas, 20 Md. 234; Inglebright v. Hammond, 19 Ohio 337. But it may sometimes be permitted afterwards, in the discretion of the court. Hill v. Postley, 90 Va. 200, 17 S. E. 946, 947.

3. Where the incompetency of a witness is discovered after

he has been sworn and has given part of his evidence, such evidence should be withdrawn, and the jury instructed to disregard it.

Jacobs v. Layborn, 11 M. & W. 685; Brockbank v. Anderson, 7 Man. & Gr. 295; Stout v. Wood, 1 Blackf. (Ind.) 71; Fisher v. Willard, 13 Mass. 379; 1 Greenl. Ev., § 421.

4. If a party calls a witness, incompetent as against himself, to testify on any point, or knowingly permits him to be examined without objection at the earliest opportunity, he is presumed to have waived all objection on that ground, and the witness may be examined at large.

Varick v. Jackson, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571, and note, 579; 1 Greenl. Ev., § 421; Donelson v. Taylor, 8 Pick. (Mass.) 390, 392; Stockton v. Demuth, 7 Watts (Pa.) 39, 32 Am. Dec. 735.

5. The authorities are not agreed as to whether, in cases where the testimony is in the form of a deposition, the objection may be made at the trial, and the matter is often regulated by statute.

Affirming that it may be made at that time are Tallot v. Clark, 8 Pick. (Mass.) 51; Pence v. Waugh, 135 Ind. 143, 34 N. E. 860; Woodard v. Cutter (Neb.), 96 N. W. 54; denying the doctrine are Hasey v. White Pigeon &c. Co., 1 Dougl. (Mich.) 193; Gregory v. Dodge, 14 Wend. (N. Y.) 603; United States v. One Case of Pencils, 1 Paine (U. S.) 400. Perhaps much may also depend on the nature of the disqualification. 1 Wig. Ev., § 18, citing C. H. Albers Commission Co. v. Sessel, 193 Ill. 153, 61 N. E. 1075.

6. A waiver of objection to the competency of a witness usually operates upon all his testimony, and stands throughout the entire trial.

Chateau v. Thompson, 3 Ohio St. 424; Beall v. Lynn, 6 Har. & Johns. (Md.) 336.

7. A party who once objects, and preserves his objection, does not lose the benefit of it by subsequently introducing evidence to

contradict the testimony of the witness, nor does he lose the benefit by cross-examining the witness.

Boylan v. Meaker, 4 Dutch. (N. J.) 274. See also Salt Lake City v. Smith, 104 Fed. 457, 43 C. C. A. 637. But compare Gale v. Shillock, 4 Dak. 182, 29 N. W. 661; Sanders v. Johnson, 6 Blackf. (Ind.) 50, 52.

8. Objections to the competency of a witness should be specifically stated.

Bunker v. Gilmore, 40 Me. 88; White Water Valley Co. v. Dow, 1 Ind. 141; Pegg v. Warford, 7 Md. 582.

9. To make an objection to the competency of a witness available on appeal, it is held that the record must show the specific objections stated to the trial court, and the reason of his incompetency, and that the testimony of the witness was material.

Emory v. Owings, 3 Md. 178; Grant v. Pevan, 4 Pa. St. 493; Bates v. Barber, 4 Cush. (Mass.) 107; Rapalje's Law of Witnesses, § 179.

Separating and Limiting Number of Witnesses.

1. When collusion among witnesses is suspected, or there is reason to believe that they will be influenced by the testimony of one another, the court will, *proprio motu,* or on the application of either party, order a separation of the witnesses, so that but one may be in court at a time.

2 Best's Ev., 636; 1 Greenl. Ev., § 432; I Stark. Ev., *133; Commonwealth v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; Rapalje's Law of Witnesses, § 237; 2 Elliott Ev., § 795.

While this, in the absence of statutory provisions on the subject, is not, perhaps, always demandable as a matter of right, yet it tends to promote justice, and should be allowed in all proper cases. See 1 Greenl. Ev., § 432; Fortescue De Laud. Leg. Angl., Chap. XXVI; Reg. v. Murphy, 8 Car. & P. 297. It is generally held not to be a matter of absolute right. 2 Elliott Ev., § 798.

2. The parties in a cause have a right to be present, notwith-

standing they are also witnesses and an order has been made for the witnesses to be examined out of the hearing of one another.

Charnock v. Dewings, 3 Car. & K. 378; Constance v. Brain, 2 Jur. (N. S.) 1145; Larue v. Russell, 26 Ind. 386; McIntosh v. McIntosh, 79 Mich. 198, 203, 44 N. W. 592. So held as to a party in interest, though not of record. Chester v. Bower, 55 Cal. 46; Ryan v. Couch, 66 Ala. 244; Shew v. Hews, 126 Ind. 474, 26 N. E. 483. And a necessary agent or the like, as in case of a corporation party. Indianapolis Cabinet Co. v. Herrmann, 7 Ind. App. 462, 34 N. E. 579; Betts v. State, 66 Ga. 508. See also, Xenia &c. Co. v. Macy, 147 Ind. 568, 577, 47 N. E. 147.

3. A witness who disobeys such an order is guilty of contempt, but the court cannot, ordinarily, at least, refuse to admit his testimony on that ground alone, where the party calling him is without fault,[1] although it is matter that may be commented on to the jury.[2]

[1] Cook v. Nethercote, 6 C. & P. 743; 2 Best's Ev., § 636; Davis v. Byrd, 94 Ind. 525, and authorities there cited; State v. Flack, 48 Kan. 146, 29 Pac. 571; 2 Elliott Ev., § 802.

[2] Chandler v. Horne, 2 M. & Rob. 423; 1 Bish. Crim. Pro., §§ 1191, 1192; Gregg v. State, 3 W. Va. 705; Taylor v. State, 130 Ind. 66, 70, 29 N. E. 415; McHugh v. State, 42 Ohio St. 154, 158.

A *right* to exclude the evidence of such witnesses seems to be recognized in several American cases, but if it really exists it is a right seldom exercised. See State v. Sparrow, 3 Murph. (N. Car.) 487; State v. Brookshire, 2 Ala. 203; Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443. It is certain a party cannot demand this as matter of right, and the weight of authority is to the effect that it is error for the court to refuse to hear such evidence. 1 Bish. Crim. Pro., §§ 1191, 1192; State v. Thomas, 111 Ind. 515, 13 N. E. 35; People v. Boscovitch, 20 Cal. 436; Bulliner v. People, 95 Ill. 394; Davenport v. Ogg, 15 Kan. 363; Grimes v. Martin, 10 Iowa 347. But see Rummel v. State, 22 Tex. App. 558, 3 S. W. 763; Ethridge v. Hobbs, 77 Ga. 531, 3 S. E. 251.

4. The trial court has the right, within reasonable limits, to restrict or limit the number of witnesses, and, unless this discretion is abused, the appellate court will not interfere with the action of the trial court in so doing.

Butler v. State, 97 Ind. 378; Anthony v. Smith, 4 Bos. (N. Y.) 503; Gray v. St. John, 35 Ill. 222; Meier v. Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. 39; note in 116 Am. St. 514.

But when a party is by law a competent witness in his own behalf, his right to testify cannot be defeated by limiting the number of witnesses. Fisher v. Conway, 21 Kan. 18, 30 Am. 419.

And in an action for slander, where the defendant, to mitigate damages, offered evidence of the bad reputation of the plaintiff for honesty, in respect to which he claimed to have been slandered, it was held error for the trial court to restrict the defendant to ten witnesses. Ward v. Dick, 45 Conn. 235, 29 Am. 677. See also, Barhyte v. Summers, 68 Mich. 341, 36 N. W. 93; Fisher v. Conway, 21 Kan. 18, 30 Am. 419; St. Louis &c. R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, 9 L. R. A. (N. S.) 425.

Impeachment of Witnesses.

1. A party may not, as a general rule and in the absence of a statute, impeach his own witness, but he may contradict him by showing that the fact is different.

Burkhalter v. Edwards, 16 Ga. 593, 60 Am. Dec. 744, and note, 749; Hickery v. United States, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. 334; Snell v. Gregory, 37 Mich. 500; 1 Greenl. Ev., § 443; Thompson v. Blanchard, 4 N. Y. 303; Smith v. Bruce, 8 Watts (Pa.) 437; 2 Elliott Ev., § 985.

There is one class of cases in which it seems a party may impeach a witness called by himself directly as to his character for truth, namely, where the party has been obliged to call the witness, as in case of a subscribing witness to a will. 1 Greenl. Ev., § 443; Brown v. Bulkley, 14 N. J. Eq. 294; Brown v. Bellows, 4 Pick. (Mass.) 194. See also, Pickard v. Bryant, 92 Mich. 430, 52 N. W. 788; 2 Elliott Ev., § 987.

Whether a party who is taken by surprise by the testimony of his own witness may contradict or impeach him, by showing statements or declarations of the witness made outside of court inconsistent with the evidence given by him at the trial, is a vexed question. Greenleaf says that the weight of authority is in favor of admitting such evidence, and Best says that the weight of authority is against it. 1 Greenl. Ev., § 444; 2 Best's Ev., § 645. See authorities, *pro* and *con*, cited in note to Burkhalter v. Edwards, 60 Am. Dec. 751; also, 11 Am. Law Rev. 261; and Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. 38, 40; note in 21 L. R. A. 418.

2. The right of a party to contradict his own witness by showing the facts to be otherwise is limited to the material facts testified to by the witness.

Friedlander v. London &c. Co., 4 Barn. & Adol. 193; Lawrence v. Barker, 5 Wend. (N. Y.) 305.

3. After a witness has been examined in chief, the opposite party may impeach him in three ways: (1) By disproving by other witnesses facts stated by him; (2) by general evidence as to his character or reputation for truth and veracity; (3) by proof of contradictory statements made by the witness outside of court.

3 Bouv. Inst., § 3228; I Greenl. Ev., §§ 461, 462; and see the exhaustive note to Blue v. Kibby, 15 Am. Dec. 99. The first way mentioned above may not be considered as impeachment in the strict sense. And bias, malice and the like may also be shown as tending to impeach in a sense at least. 2 Elliott Ev., §§ 971, 973. So, as to conviction of infamous crime, and the like, 2 Elliott Ev., §§ 933, 981.

4. As has been already shown, where an attempt is made to impeach a witness by disproving his statements by the testimony of other witnesses, it must ordinarily be confined to material or relevant facts, and cannot extend to collateral and irrelevant matters brought out by himself on cross-examination.

1 Greenl. Ev., § 449; 2 Best's Ev., § 644; Bell v. Woodman, 60 Me. 465; Carpenter v. Ward, 30 N. Y. 243.

5. The second mode of impeachment is to inquire of the impeaching witness whether he knows the general character or reputation of the witness sought to be impeached for truth and veracity among his neighbors, and, if he knows it, what it is.

3 Bouv. Inst., § 3230; 1 Greenl. Ev., § 461; and note to Blue v. Kibby, 15 Am. Dec. 100; 2 Elliott Ev., § 980.

In some jurisdictions the question may be asked as to the general reputation of the witness sought to be impeached, without confining it to reputation for truth and veracity. See Hume v. Scott, 3 A. K. Marsh. (Ky.) 261; State v. Boswell, 2 Dev. (N. Car.) 209; State v. Breeden, 58 Mo. 507. But the better rule is as stated above. 3

Bouv. Inst., § 3230, and note; Kilburn v. Mullen, 22 Iowa 498; People v. Yslas, 27 Cal. 630; State v. Morse, 67 Me. 428; Rudsdill v. Slingerland, 18 Minn. 382. See for other cases on both sides, 2 Elliott Ev., § 978. In Indiana and a few other states the right to inquire as to the general moral character is statutory. Walton v. State, 88 Ind. 9.

And in England and some of our states an additional question may be asked as to whether the impeachment witness would believe the other on oath. See 1 Stark. Ev., *182; 1 Greenl. Ev., § 461; 2 Best's Ev., § 644; People v. Mather, 4 Wend. (N. Y.) 229, 257, 21 Am. Dec. 122; Chess v. Chess, 1 Pen. & W. (Pa.) 32, 31 Am. Dec. 350; Bogle v. Kreitzer, 46 Pa. St. 465; Keator v. People, 32 Mich. 484; 2 Elliott Ev., § 980.

Contra Walton v. State, 88 Ind. 9; Phillips v. Kingfield, 19 Me. 375, 36 Am. Dec. 760; State v. Miles, 15 Wash. 534, 46 Pac. 1047.

But particular facts or acts of immorality cannot be proved for the purpose of impeaching a witness. Evans v. Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74, and note, 77; Long v. Morrison, 14 Ind. 595; Root v. Hamilton, 105 Mass. 22; Davis v. State, 87 Miss. 337, 39 So. 522; State v. Sibley, 132 Mo. 102, 33 S. W. 167, 53 Am. St. 477, and note; 2 Elliott Ev., § 978; 3 Bouv. Inst., § 3230; 1 Greenl. Ev., § 461.

When an attempt has been made to impeach a party's witness in this manner—that is, by showing the general reputation of the witness for truth and veracity to be bad—he may cross-examine the impeaching witness as to his means of knowledge or grounds for his opinion, or he may attack the general character of the impeaching witness, and by fresh evidence support the character of his own witness. 1 Greenl. Ev., § 461; 1 Stark. Ev., *182; 3 Bouv. Inst., § 3230; Saw v. Emery, 42 Me. 59; Craig v. State, 5 Ohio St. 605.

6. In order to impeach a witness by the third mode, that is, by proof of contradictory statements out of court, a foundation therefor must first be laid by asking him if he did not make the statement relied on to impeach him, to a certain person, at a certain time and place, specifying them as particularly as possible.

1 Greenl. Ev., § 462; Whart. Ev., § 555; Williamson v. Peel, 29 Iowa 458; Downer v. Dana, 19 Vt. 338; Richardson v. Kelly, 85 Ill. 491; Hinton v. Cream City R. Co., 65 Wis. 323, 27 N. W. 147, 150; Hoagland v. Canfield, 160 Fed. 146, 171; Roller v. Kling, 150 Ind. 159, 49 N. E. 948. But this is generally held unnecessary as to admissions of a party. 2 Elliott Ev., § 972.

A witness can be impeached in this manner only as to statements of matters relevant to the issue, and not merely collateral thereto. 1 Greenl. Ev., § 462; Sellers v. Jenkins, 97 Ind. 430; 3 Bouv. Inst., § 3231. See on the whole subject of impeachment in this way, 2 Elliott Ev., §§ 974-977.

Depositions.

1. The rules of practice to be observed in taking depositions are those provided by the statute of the State or country from which the commission or *dedimus* issues, and not those obtaining in the jurisdiction where the witness is found, unless they are the same.

City Bank v. Young, 43 N. H. 457; Bostwick v. Lewis, 1 Day (Conn.) 33; Thompson v. Wilson, 34 Ind. 94. See also, McGeorge v. Walker, 65 Mich. 5, 31 N. W. 601; Midland Steel Co. v. Citizens' Nat. Bank, 34 Ind. App. 107, 118, 72 N. E. 290. But see as to taking under letters rogatory, Nelson v. United States, Peters C. C. (U. S.) 235.

So the act of congress governs in the taking of depositions to be used in the United States courts. Randall v. Venable, 17 Fed. 162. But congress has provided that depositions may also be taken "in the mode prescribed by the laws of the state in which the courts are held." R. S. U. S., § 866, 27 U. S. St., § 7.

2. A commissioner appointed to take testimony cannot delegate his authority.

Chappeau v. Baker, 1 Har. & G. (Md.) 154; Urquhart v. Burleson, 6 Tex. 502.

But it seems that where the officer before whom the deposition is to be taken is not required to be specified in the notice, naming a particular officer therein will not render the deposition invalid because it is taken before another officer. Harvey v. Osborn, 55 Ind. 535. And commissions in blank are authorized in some jurisdictions. See generally as to what officers may take depositions. 2 Elliott Ev., §§ 1134-1142

3. Where the time for which notice is required to be given is not specifically fixed by statute, a reasonable notice should be

given,[1] and in determining its sufficiency the courts will take judicial notice of distances, and facilities for travel.[2]

[1] Henthorn v. Doe, 1 Blackf. (Ind.) 157; Cefret v. Burch, 1 Blackf. (Ind.) 400; Attwood v. Fricot, 17 Cal. 37, 76 Am. Dec. 567; Fitzpatrick v. Paper, 89 Ind. 17; Manning v. Gasharie, 27 Ind. 399; 2 Elliott Ev., § 1156.

[2] Hipes v. Cochran, 13 Ind. 175; Manning v. Gasharie, 27 Ind. 399.

4. The notice must describe the place of taking the deposition with reasonable certainty.

Rodman v. Kelly, 13 Ind. 377. See also 2 Elliott Ev., § 1152.

But defects in the notice may be waived by an appearance at the taking of the deposition without objection. Prather v. Pritchard, 26 Ind. 65; Doe v. Brown, 8 Blackf. (Ind.) 443. And a change in the place named without objection will not be cause for suppressing the deposition. Gartside Coal Co. v. Maxwell, 20 Fed. 187.

5. When necessary, the officer may continue the taking from day to day until it is completed.

Ulmer v. Anstill, 9 Port. (Ala.) 157; King v. State, 15 Ind. 64; Kelley v. Martin, 53 Kan. 380, 36 Pac. 705.

6. Although not required in all jurisdictions, it is safest to have the witness sworn before the examination.

Stonebreaker v. Short, 8 Pa. St. 155; Thiebaud v. Sebastian, 10 Ind. 454; Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737. But see Tooker v. Thompson, 3 McLean (U. S.) 92; Barron v. Peter, 18 Vt. 385.

7. Where the deposition is taken in the ordinary manner, and not by interrogatories previously prepared, the party against whom it is to be used has a right to cross-examine the witness.

Daunfelser v. Weigel, 27 Mo. 45; Stille v. Layton, 2 Harr. (Del.) 149.

8. Objections to the form of a question, as leading or the like, or as to the manner of taking the deposition, should, as a rule, be made at the time.

Craft v. Rains, 10 Tex. 520; Crowell v. Bank, 3 Ohio St. 406; Cham-

bers v. Hunt, 22 N. J. L. 552; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

9. In some jurisdictions objections to the competency of the witness must be made before trial; in others they may be made at or during the trial.

See authorities cited in "Rules of Practice on Taking Deposition," 22 Cent. L. J., 581, 585; also 2 Work's Ind. Pr., § 1245; 2 Elliott Ev., § 1183.

10. Provision is also generally made for taking depositions by interrogatories previously prepared, and, in such case, no cross-examination is allowed, except by cross-interrogatories, and the mere presence of the attorney of either party at the taking has been held sufficient cause for rejecting a deposition.

Hollister v. Hollister, 6 Pa. St. 449.

11. All pertinent and proper interrogatories and cross-interrogatories must be answered.

Nicholson v. Desobry, 14 La. Ann. 81.

And portions not responsive to the interrogatories will be excluded. McCarver v. Nealey, 1 Greene (Iowa) 360.

12. Where depositions are taken under a commission, they should be subscribed by the witness, although it has been held sufficient by some of the courts if the fact that the witness was duly sworn appears from the certificate;[1] and the signature of the commissioner seems absolutely necessary.[2]

[1] See 22 Cent. L. J., 581, 584, and authorities cited. See also, 2 Elliott Ev., § 1161.

[2] Price v. Emerson, 16 La. Ann. 95.

13. The statutes of the various States usually prescribe what the certificate should show, and where they do not it is safest, though held unnecessary in some cases, to show that all the statutory steps have been taken.

See 22 Cent. L. J., 581, 585, and authorities cited. Also, Madison, I. &

P. R. Co. v. Whitesel, 11 Ind. 55; Thiebaud v. Sebastian, 10 Ind. 454; Simpson v. Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707, and note, 716; 2 Elliott Ev., § 1166.

14. Where the certificate is informal or defective it may be amended by the officer on leave of court.

Donahue v. Roberts, 19 Fed. 863; Gartside Coal Co. v. Maxwell, 20 Fed. 187.

15. When a commission is addressed to a resident of another state by name, no proof of his official character or signature is necessary;[1] but where the officer has no seal, and is not named in the commission, his certificate is generally required to be authenticated under the seal of a court of record.[2]

[1] Bradford v. Cooper, 1 La. Ann. 325; Kendall v. Limberg, 69 Ill. 355.

[2] Baber v. Rickhart, 52 Ind. 594; Jenkins v. Tobin, 31 Ark. 306; Wheeler v. Shields, 2 Scam. (Ill.) 348.

16. Objections to the validity or admissibility of depositions by motion to suppress, or otherwise, must be specific,[1] and the order suppressing the deposition, or any part of it, must be definite and certain.[2]

[1] Hunt v. Bailey, 4 Ind. 630; Pettigrew v. Barnum, 11 Md. 434, 69 Am. Dec. 212; Maggart v. Freeman, 27 Ind. 531; 2 Elliott Ev., § 1185.

[2] Hayes v. Hinds, 28 Ind. 531.

Inspection and View.

1. Trial by inspection or examination was a well recognized mode of procedure under the old common law, and it is yet often resorted to in modern practice.

3 Bl. Com. 329; "Trial by Inspection," 25 Cent. L. J. 3; 2 Elliott Ev., § 1231, *et seq.*

2. In accordance with the old practice, where not changed by statute, an inspection may be had in criminal trials where a fe-

male defendant who has been found guilty pleads her pregnancy in stay of execution.

Reg. v. Baynton, 17 How. St. Tr. 589, 631; Reg. v. Wycherly, 8 Carr. & P. 262.

3. An inspection may often be had where the question of personal identity, age, or legitimacy arises.

3 Bl. Com. 332; Att'y-Gen. v. Fadden, 1 Price 403; Warlick v. White, 76 N. Car. 175; State v. Smith, 54 Iowa 104, 6 N. W. 153; Commonwealth v. Hollis, 170 Mass. 433, 49 N. E. 632; Hermann v. State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. 789. But see State v. Danforth, 48 Iowa 43, 30 Am. 387; Ihinger v. State, 52 Ind. 251. See also for further consideration of the subject and review of conflicting authorities, 2 Elliott Ev., §§ 1234, 1235.

4. In proceedings for divorce or nullity of marriage on the ground of impotency or sexual incapacity, an inspection may be ordered when shown to be necessary.

Devenbaugh v. Devenbaugh, 5 Paige (N. Y.) 554-557; Briggs v. Morgan, 3 Phillimore 325, 1 Eng. Ecc. 408-490; Shafto v. Shafto, 28 N. J. Eq. 34; 2 Bish. Mar. & Div., § 590.

But this seems to be discretionary with the trial court. Anon, 35 Ala. 226; 2 Danl. Ch. Pr. 1136.

5. It is common practice in criminal trials to exhibit, for the inspection of the jury, the weapon with which the crime was committed,[1] blood-stained clothing,[2] or, in general, "any material object capable of being produced in the court-room and exhibited to the jury, the physical characteristics of which speak in evidence, in connection with the oral evidence, concerning the alleged crime."[3]

[1] McDonel v. State, 90 Ind. 320; Wynne v. State, 56 Ga. 113; Mitchell v. State, 94 Ala. 68. 10 So. 518.

[2] Commonwealth v. Twitchell, 1 Brewst. (Pa.) 561, 563; Richards v. State, 82 Wis. 172, 51 N. W. 652.

[3] See, for example, Commonwealth v. Brown, 121 Mass. 69; People v. Gonzales, 35 N. Y. 49; Story v. State, 99 Ind. 413; Hart v. State, 15 Tex. Ct. App. 202, 49 Am. 188, and note, 191; 37 Alb. L. J. 85; 2 Elliott Ev., § 1232.

6. It is held that physical examination of the prisoner in a criminal trial will not be ordered against his consent, for this might be compelling him to criminate himself.

Rex v. Warsenham, 1 Ld. Raym. 705; People v. McCoy, 45 How. Pr. (N. Y.) 216; Stokes v. State, 5 Baxt. (Tenn.) 619, 30 Am. 72; 22 Alb. L. J. 144. But see State v. Ah Chuey, 14 Nev. 79, 33 Am. 530, and note, 540. See also, 2 Elliott Ev., § 1232

7. In an action for damages for personal injuries, the court may allow the plaintiff, while testifying as a witness in his own behalf, to exhibit the injured part to the jury.

Barker v. Town of Perry, 67 Iowa 146, 25 N. W. 100; Ind. Car Co. v. Parker, 100 Ind. 181; Louisville &c. R. Co. v. Wood, 113 Ind. 544, 549, 14 N. E. 572, 16 N. E. 197; Mulhado v. Brooklyn City R. R. Co., 30 N. Y. 370; Disotell v. Henry Luther Co., 90 Wis. 635, 64 N. W. 425.

Whether the court may compel such an exhibition, or a surgical examination before trial, is a vexed question, with the weight of reason and authority apparently in favor of the affirmative. That this power exists and may be exercised in proper cases, see Schroeder v. Chicago &c. R. R. Co., 47 Iowa 375; White v. Milwaukee City R. Co., 61 Wis. 536, 50 Am. 154, and authorities cited in note, 156; City of South Bend v. Turner, 156 Ind. 418, 428, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. 200, and cases cited; Atchison, Topeka &c. R. R. Co. v. Thul, 29 Kan. 466, 44 Am. 659. This view is approved by Judge Thompson in a leading article in 25 Cent. L. J. 3, 7. See, *contra*, Union Pac. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. 1000; Stuart v. Haven, 17 Neb. 211, 214, 22 N. W. 419; Parker v. Enslow, 102 Ill. 272; Newman v. Third Ave. R. R. Co., 50 N. Y. Super. Ct. 412.

8. If the plaintiff refuses to obey an order for examination or inspection properly made, the court may dismiss the action, or refuse to permit him to give evidence of his injury,[1] and he may, perhaps, become liable as for contempt.[2]

[1] Turnpike Co. v. Baily, 37 Ohio St. 104.

[2] Harrison v. Sparrow, Curt. Ecc. 1, 14, 7 Eng. Ecc. 357. But that he cannot ordinarily be punished for contempt in most jurisdictions, see City of South Bend v. Turner, 156 Ind. 418, 428, 60 N. E. 271, 83 Am. St. 200, 54 L. R. A. 396.

9. Evidence of a surgeon who examined the plaintiff out of court, in the absence of the adverse party, is not rendered inadmissible on that account.

Louisville &c. R. R. Co. v. Falvey, 104 Ind. 409, 417.

10. On the trial of an issue involving the quality or condition of a chattel, the court may permit it to be exhibited to the jury with proper evidence as to its identity and condition at the time in question.

Luie v. Taylor, 3 F. & F. 731; King v. N. Y. Cent. R. R. Co., 72 N. Y. 607; Evarts v. Middlebury, 53 Vt. 626.

One of our courts has gone so far as to permit witnesses to imitate the singing of a party, the quality of which was in question. State v. Linkham, 69 N. Car. 214, 12 Am. 645. And an English court, in the case of Thurman v. Bertram, 20 Alb. L. J. 151, permitted a baby elephant to be brought before it. See also Forsythe's Hist. of Lawyers, 89.

11. Under the statutes in force in most of the States, the jury may be sent out to view the place where the crime was committed or the injury happened, or the features of which are involved in the controversy.

Proffatt's Jury Tr., § 370; People v. Bush, 68 Cal. 623, 10 Pac. 169; Chute v. State, 19 Minn. 271, 281; 2 Elliott Ev., § 1242.

12. The object of the view is generally held to be to enable the jury to understand the evidence and its application, not to collect new evidence.

Wright v. Carpenter, 49 Cal. 608; Heady v. Vevay, &c., Turnpike Co., 52 Ind. 117; Close v. Samm, 27 Iowa 503; People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368; Machader v. Williams, 54 Ohio St. 344, 345, 43 N. E. 324; State v. Mortensen, 26 Utah 312, 73 Pac. 562, 633. But it may be treated as evidence in some jurisdictions. City of Springfield v. Dalbey, 139 Ill. 34, 29 N. E. 860; Parks v. Boston, 15 Pick. (Mass.) 198; Toledo &c. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; Neilson v. Chicago &c. R. Co., 58 Wis. 516, 17 N. W. 310. See 2 Elliott Ev., § 1243.

13. Permitting the jury to view the premises is a matter usually left largely to the discretion of the trial court.

Williams v. Grand Rapids, 53 Mich. 271, 18 N. W. 811; Coyner v. Boyd, 55 Ind. 166; People v. Buddensieck, 103 N. Y. 487, 9 N. E. 44; Klepsch v. Donald, 4 Wash. St. 436, 30 Pac. 991; Andrews v. Youmans, 82 Wis. 81, 52 N. W. 23.

14. Where the statute provides the course to be followed in such cases a material variance therefrom, if shown to have been injurious to the complaining party, may be sufficient to cause a reversal.

Erwin v. Bulla, 29 Ind. 95; 2 Elliott Ev., § 1244.

But mere irregularity, not shown to have affected the verdict, or to have harmed the complaining party, will not entitle him to a new trial or reversal of the judgment. Luck v. State, 96 Ind. 16; City of Indianapolis v. Scott, 72 Ind. 196. See generally as to manner of proceeding, 2 Elliott Ev., § 1244.

15. A statute is not unconstitutional merely because it provides for a view of the place where the crime was committed, with the consent of the accused, in his absence; and where he requests an inspection under such a statute, it is not error for the court to permit it in his absence.

Shular v. State, 105 Ind. 289, 4 N. E. 870; State v. Adams, 20 Kan. 311; People v. Bonney, 19 Cal. 426; State v. Mortensen, 26 Utah 312, 73 Pac. 562, 633. But see Carroll v. State, 5 Neb. 1; Benton v. State, 30 Ark. 328; Foster v. State, 70 Miss. 755, 12 So. 822.

16. Instead of a view and an inspection by the jury, in cases where the identity of a person, or the appearance or condition of a place or thing at a previous time, is in issue, photographs thereof, taken at the time in question, may be admitted in evidence, upon proof of their accuracy.

People v. Buddensieck, 103 N. Y. 487, 9 N. E. 44; Cowley v. People, 83 N. Y. 464, 38 Am. 464; Reddin v. Gates, 52 Iowa 210, 2 N. W. 1079; Blair v. Pelham, 118 Mass. 512; Udderzook's Case, 76 Pa. St. 340. See also, 2 Elliott Ev., §§ 1226, 1227, where numerous illustrations are given; also note in 114 Am. St. 438, *et seq.*

17. It is not error, it seems, for counsel, in arguing an application for a view, to state to the judge in the presence of the jury what they will see.

Boardman v. Westchester Fire Ins. Co., 54 Wis. 364, 11 N. W. 417.

18. The court may, upon its appearing unnecessary, vacate an order for a view previously made.

Nesbit v. Kerr, 3 Yeates (Pa.) 194.

CHAPTER VI.

THE DELIVERY OF THE EVIDENCE.

"It is with great satisfaction your committee has found that the reproach of 'disgraceful subtleties,' inferior rules of evidence which prevent the discovery of truth, of forms and modes of proceeding, which stand in the way of that justice, the forwarding of which is the sole rational object of their invention, cannot fairly be imputed to the common law."—*Burke.*

"To prove an assertion is to establish it in full view of hostile criticism; the function of the advocate being to find and bring forward reasons for belief or disbelief."—*Alfred Sidgwick*

Practical Suggestions.

In the delivery of evidence two things are essential; one is, to create a decided impression in the minds of the jurors, the other is, to effect a lodgment in their memories.[1] For the reason that it is important to make an impression not easily effaced, it is better to open, when it can be done without violating the natural order, with a witness who will testify as to material facts, and do it with clearness and strength.[2] A dull witness or unimportant testimony, at the outset, is very likely to cloud the future progress of the case, because the mental vision is not fully aroused. Neither the mental nor the physical vision is attracted by dull objects, but looks upon them listlessly and carelessly. Once this feeling takes possession of the mind it is not easy to

[1] "The chief difficulty in arguing with most men, and, therefore, with a jury, is not to convince them, but to prevent them from too rapidly forming an opinion."—*Scintillae Juris,* 96.

[2] Professor Robinson strongly advises that the first and last witnesses especially should be effective, and observes that when these extremes are strong and convincing the weakness of intermediate testimony is not so important and is often lost sight of by the jury. Robinson's Forensic Oratory, § 208.

banish it. When the attention is freshly fastened upon a matter it takes stronger hold than at any other time, and, if it is fully aroused, maintains its hold without weariness. For this, if for no other reason, a bright, frank, well-mannered witness should first go upon the stand. This, we know, is opposed to the advice of so eminent an authority as Mr. Chitty, who recommends the opening of the evidence with merely formal proofs; but experience and observation have satisfied us that the true course is that which we have indicated, and, certainly, if we accept as our guide the teachings of mental philosophers, we must account Mr. Chitty in error. The first witness, like the first stroke of the brush on clear canvas, makes the first traces on minds comparatively free from any impression. The traces he makes will remain until effaced or hidden by the testimony of succeeding witnesses, and only strong evidence will hide or efface them. The same process that makes a strong first impression lodges the matter so firmly in the memory that it is not soon lost or obliterated.

Facts, as they emerge from the testimony, must be set in the strongest possible light, so that the jury may get the very best attainable view of them. This view they can not get if the facts are set before them in disorder and confusion.[8] An army will accomplish little if widely dispersed in irregular formations, but when massed in divisions, brigades and battalions it is formidable. It is scarcely too bold a figure that likens the facts of the advocate's case to the soldiers of the general. It is when these facts are marshaled in compact bodies, each in its appropriate place, like soldiers in companies or platoons, that they do most execution. Disorganized stragglers are elements of weakness in an army, and straggling facts in a case are not very different. It is, therefore, of great importance to so arrange the evidence that it shall fall into groups. Each group must take its appropriate place in the general formation, and should be complete and compact. When once facts belonging to a group are given in evidence, all that belong in the same group should follow in orderly succession.

[8] See also, Robinson's Forensic Oratory, §§ 199-204.

Groups of facts must be arranged in natural order, and the rules of logical relation determine their respective positions with relation to each other. A ragged, straggling, disorderly body of facts creates confusion; one treads upon another, one hides another, and one pushes another, like urchins scrambling in a rush for the playground. Many are dimly seen, none clearly perceived. No pains should be spared to secure an orderly grouping of the facts, nor should any labor be omitted to keep each group in its place and filled with its full complement of facts. Until one group has been completed, it should be the sole object of attention; but, when completed, it should be allowed to stand in its place until another compact and finished group rises at its side.

Facts can not be effectively grouped together unless a natural method is adopted. What in natural order is entitled to the first place must be awarded it. The thing which a reasonable mind would naturally expect to first appear must lead off, followed in natural order by attendant facts. Obedience to this fundamental principle will sometimes prevent the advocate from putting forward his brightest witness at the outset, but it is safer to adhere to the principle, even though the witness who is chosen to lead the way is not the best. This fundamental principle of arrangement should be steadfastly adhered to, but the best witness of the group which stands first in natural order should always speak the opening words. In filling out the groups the strongest witness should be first called, and after him should come, in orderly succession, those whose testimony is most nearly allied to his, for by this means the jurors start with quickened attention and an intelligent view of the subject. With such a start they readily follow, without perplexity or confusion, the testimony as it falls from the witnesses. If, however, the connection between the testimony of the witnesses is not clearly maintained, the minds of the jurors will be distracted by the introduction of new subjects, and the force of the testimony will be much weakened. Where the groups are not filled in an orderly way confusion and obscurity result, burdening the mem-

ory and wearying the understanding. One who has never followed an intricate case throughout its development cannot form an adequate conception of the strength given the case by a careful assemblage of the facts in clusters, with each cluster filled out in logical order.

The assemblage of facts in groups adds greatly to their strength upon all questions, but on none, probably, so much as on questions of character and reputation. Where witness follows witness, in unbroken succession, in an assault upon the reputation of a party or a witness, the effect of the attack is very much greater than where the witnesses straggle along throughout the investigation in irregular order. What is true of the attack is true of the defense. An attack or defense by a solid array of witnesses is infinitely more formidable than an irregular and rambling one. A massed column will succeed where an irregular assemblage of stragglers will fail.

An unbroken and forward movement of a case adds strength, unless the case is in itself a weak one. Good cases suffer by breaks and delays; bad cases profit by them. If the advocate has confidence in his cause he should keep it in progress, resisting as far as in his power all halts and delays. He who believes he ought to succeed will push forward with vigor and energy, while he who fears the result will do well to let the case drag as wearily along as he can. Delays may, of course, often be desired in order to secure witnesses who are not immediately at hand; but, unless there is some substantial reason for procrastination, the advocate who feels confident of success should prevent, as far as possible, any postponement or delay. For this reason, process should be promptly issued, and its seasonable service secured.

It is unwise to trust to the promises of witnesses. There is but one safe course, and that is to employ the process of the court, and to keep the witnesses in attendance. A departure from this rule will in many cases work mischief, for careless and tardy witnesses may cause a break in the order adopted and compel the presentation of the evidence in a method so bad and disorderly as to greatly impair its strength. In this respect, at least, the advocate's first duty is to his client. If moved by a desire to ac-

commodate others, or through carelessness he is derelict, he shamefully betrays his trust. Importunity of witnesses should not move him, nor neglect lead him astray. The duty he owes to his client demands of him that he should take measures to enable him to coerce, if need be, the attendance of witnesses, and that he should firmly require them to remain near at hand, so that their testimony may go to the jury in the most effective order. In discharging this duty the advocate may, in strictest honor, agree with Brougham, that "An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world—that client, and none other." To this extent we may concur with that great advocate, although we cannot follow him further.

There is not a moment without some duty during the delivery of the evidence, and the just discharge of this duty demands a vigilant eye and an undivided attention. The closest attention and most scrupulous care are required of the advocate, in many instances, to secure from his own witnesses full and clear statements, for there will be stupid witnesses who obscure the facts, and swift ones who hurry over them, leaving much untold. If the testimony of the one class be not cleared of obscurities, and that of the other class be not brought out so slowly and fully as to be distinct, the evidence will but slightly, if at all, influence the jury. If testimony is worth the hearing, it is worth the pains it will cost to so bring it out that it may fall upon the minds of the hearers with a force that will do far more than create a mere transient impression. General statements are of much less force than specific ones. "The more general the terms," says Dr. Campbell, in giving expression to a familiar principle, "the picture is the fainter; the most special, the brighter." If the details of an important transaction can be brought out with such distinctness as to enable the leading minds of the jury to see the place, the time, the actors and the acts, an impression will be made that cannot be easily removed. It is for this purpose that testimony is important, and it should, therefore, go to the jury with earnestness and force, not in a careless, stupid or flippant manner. The jurors rightly conceive that they are in the box

for an important purpose, and they, as all men do in like positions, desire that what comes to them shall come as having weight, and deserving the attention of men of business. He will not err who keeps his case as clear as possible of unimportant matters, but he will err who contents himself with allowing the facts to go to the jury in vague and uncertain form.

A constant and determined guard must be maintained to prevent the introduction of incompetent evidence that may do harm. Such evidence should never reach the ears of the jurors if "skill of fence" can prevent it. If possible it should not be heard at all, although it is promised that on future consideration it may be struck out. Evidence once heard, if important, leaves an impression.[4] An impression once made requires evidence to remove it, and thus makes the task more difficult than it would be if minds free from all impressions were to be convinced. Quick and strong should be the interposition to prevent the introduction of harmful and incompetent evidence, but if it gets to the jury let the subsequent effort to reject it be quiet and mild, rather than earnest and determined; for the stronger the effort to get rid of it, the more importance jurors will attach to it, and the deeper it will sink into their minds. The better plan is to put the motion to reject in writing, stating specifically the grounds of objections, and hand the paper to the court without argument. If, however, the advocate deems it expedient to fasten the minds of the jurors upon the matter, as sometimes happens, then the more earnest the argument the better.

It is only evidence that is likely to do harm to which an objection should be made, except, perhaps, where the purpose is to prevent a useless waste of time, or the concealment of important facts by a mass of immaterial matter. It is folly to make objections where there is no reason to believe that the testimony will do harm. If the testimony is not harmful it is far better to let it go in than to be thought a technical, carping critic. Those who fritter away time in unimportant objections bring upon themselves a reproach which much impairs their power with the jury. A man who abounds in objections finds no favor with court

[4] See People v. Springer, 137 App. Div. (N. Y.) 304, 122 N. Y. S. 194.

or jury. "Never object to a question from your adversary," says David Paul Brown, "without being able and disposed to enforce your objection." The reason for this rule is not far to seek. If objections are fruitlessly made an air of weakness is given to the case, for jurors are apt to infer that an advocate against whom the court often rules has a feeble case, which he is attempting to prop by technical objections. So, too, they are apt to regard it as an effort to keep the truth from them, or to give them only a partial view of it. They, be sure, know of the charge so persistently, and most often so unjustly, laid against lawyers, of attempting by tricks and artifices to bewilder courts and juries, and so defeat justice. It is but reasonable, therefore, to expect them to look with great disfavor on anything that looks like a professional trick or a lawyer's technicality. What they want is full information, and they resent any effort to keep it from them.[5]

If an objection is worth the stating, it is worth supporting. If an objection is stated, let the best and strongest reasons that can be commanded be brought to its support. Once it is made the true policy is to stand to it, earnestly, but courteously, and not let it pass without a struggle. Of course, no struggle will be openly made after the court has announced its opinion, for that would be not only discourteous, but mischievous. Unless the judge is clearly in the wrong, or is unfit for his position, the jury will sympathize with him, since they will regard him as just and impartial, and look upon the advocate as a prejudiced man, working only for a reward.[6] If a fight is to be made, let it be made as

[5] "The habit of making constant objections to the introduction of evidence, without being able to assign any reason for such objections, indicates a desire to suppress the truth, and a jury are not slow in discovering that fact."—Quoted from Law Notes for December, 1910.

[6] "In their zeal to serve their clients counsel sometimes indulge a habit of objecting when it must be apparent that no valid ground of objection exists. Objections of the character indicated do not tend to preserve a record, but rather tend, as is suggested by counsel, to cause the jury to infer that the trial court, by repeated rulings against the objections, is adverse to the position of the objecting party upon the merits of the case. The injury resulting from such an inference by the jury would be very appreciably obviated if counsel would limit their objections to matters which

vigorously as you will before the ruling is announced. A hearing courteously requested will seldom be denied. There are cases where it may not be improper to ask leave to again argue an objection, and when this is necessary the wise advocate will ask it courteously and respectfully, but openly and frankly, and will not seek to accomplish his object by indirection. It is seldom that an objection should be withdrawn, but it may happen that it is better to withdraw it, and when this does happen, let it be withdrawn openly and candidly. A frank acknowledgment of error is better than a covert attempt at an evasive retreat.

There are cases in which, from rulings on the pleadings or rulings on the evidence, the advocate will have reason to expect that the court will rule adversely to him upon objections to evidence, and where there is reason to expect this it is well to write objections in advance, and, with little comment, deliver them to the court. Repeated statements of objections serve to fasten the obnoxious evidence in the minds of the jurors, and prudence dictates that, in general, there be as few repetitions as possible. There are, as we have hinted, cases where it is desirable to state and argue objections, even though they are certain to be overruled; but these are exceptional cases, seldom arising in actual practice. When the advocate is quite sure that the evidence he assails can be overcome, it is well enough to persistently object, since that will make it seem the more important, and when it falls the greater will be the impression produced by its downfall.

Where a willing witness is being led by questions plainly objectionable, because they are leading, it is good policy to do no more than say enough to attract attention to the fact that counsel is suggesting answers. This may be done without formal objection, as by a playful remark, or a suggestion to the examiner; but enough must be done to bring the matter to the attention of the jury. If once they can be made to believe that the witness is testifying as counsel dictates, little weight will the testimony of that witness be accorded. In argument, the manner of counsel and witness will be fair matter of comment, and the man who can

they believe in good faith to be objectionable."—Quoted from opinion in Walker v. Chicago &c. R. Co., 149 Ill. App. 406, 411.

not profit by it has mistaken his vocation. Nor is this the only reason why such a course is sometimes expedient. Another reason is, that a witness who has been uttering the answers suggested by leading questions leans entirely on his mentor, and when, on cross-examination, that prop is pulled from under him, he goes down. But it is not safe to assume in every case that the jury will see that leading questions suggest the desired answers, for they are often so adroitly framed that even the witness is unconscious that the counsel is suggesting his answers. A skillful examiner will often so frame his questions as to suggest the answers and yet conceal from the jurors his purpose; and when this is the case, the only course is to expose the artifice and press the objection with determination and vigor. If the judge declines to interfere, as he may do (for the matter is much one of discretion), the jury, if the advocate has done his duty and fully exposed the unfairness of such an examination, will not be prejudiced by the decision of the judge against the objecting party; on the contrary, they will be very apt to take sides with him. If, however, the matter is not important, or the witness clearly is an unwilling one, it is not expedient to object, for the probability is that the objection will be unavailing; and even if it is sustained, the jury are not unlikely to infer that a fair opportunity was not allowed opposing counsel to get all the facts from the witness.

More often than one not acquainted with judicial trials would suppose, witnesses simulate hostility to the party calling them, and where there is reason to suspect that the appearance of hostility is assumed, and not real, objections to leading questions should be fully stated and vigorously pressed. If the advocate can, in presenting his objections, arouse such a witness to anger, the disguise he has assumed will, in most cases, drop off, and when this result can be accomplished it breaks down the witness, unless he is strongly supported by other evidence. If, however, the witness' hostility is real, and not simulated, then no objection to leading questions should be interposed, unless there is some reason for it peculiar to the case; and, if interposed, the witness should be treated with the utmost kindness in all that is said to

the court in discussing the objection. If the advocate can impress such a witness with the belief that the objection is pressed in justice to him, as well as in behalf of the client, a point of no mean importance will be gained. But, unless this can be done without blundering, it had better not be attempted. It is delicate work, not to be done by open avowals, but by adroit hints and suggestions.

It is the right of counsel to examine witnesses called by his adversary, to ascertain their competency, and this right, for the obvious reasons already suggested, should, whenever it is possible, be exercised before the witness is permitted to give testimony to the jury. The ordinary mode of ascertaining whether the witness is competent is by examining him on what is called the *voir dire*.[1] This is a preliminary examination, conducted with a view to enable the court to determine the competency of the witness, and not for the purpose of eliciting facts for the consideration of the jury.

The preliminary examination, in strictness, extends only to the question of the competency of the witness to testify at all, but it is sometimes loosely said to apply to his competency to state particular facts. It is true that a witness may sometimes be competent as to one branch of a case, and not as to another, and in such a case it would be proper to object to his competency; but where the incompetency is in the evidence, and not in the witness, the objection must be to the evidence. Thus, if the objection is that the witness is speaking as to the contents of a written instrument, the infirmity is in the evidence, and not in the witness. In conducting the preliminary examination as to the competency of the witness, the point sought to be reached is, that he shall not be heard at all, or that he shall not be heard upon a particular branch of the case. To illustrate, the witness testifies that he saw the accused kill the deceased, and is then asked as to the mental capacity of the former. Here an objection as to the competency of the witness to testify on the question of mental capacity would be proper, although he was competent to testify as to the fact of the killing.

[1] See Trussell v. Scarlett, 18 Fed. 214, and note.

The examination on the *voir dire* usually precedes the examination in chief; but if anything occurs during the trial to induce the advocate to suspect that the witness is incompetent, he may ask leave to examine on the question of competency. The matter is, however, very much within the discretion of the court, and if it is satisfied that the witness is *prima facie* competent, the evidence may be heard; but if heard, and subsequently shown to be incompetent, the proper course is to move to reject it, and to repeat this motion, in effect, although not in form, by requesting the court in its instructions to charge the jury that it is their duty to wholly disregard the evidence, and not suffer it to influence them in their consideration of the case.

It is proper for counsel to interpose questions for the purpose of ascertaining whether the testimony is competent. In doing this the purpose is not to show that the witness is incompetent, but to show the incompetency of the testimony. It is often expedient to ascertain whether the matters of which the witness speaks are contained in documents, letters, deeds, written agreements, and the like, and, for this purpose, it is proper to make inquiry whether the matters are contained in any written instrument. It is, also, sometimes quite important to stop a witness and inquire whether he is relating facts within his own knowledge, or is merely rehearsing what he has heard from others. Promptness and decision are essential to prevent what Mr. Chitty calls "the inception of an irregular question."[8] But these qualities are not inconsistent with the quality of courtesy, and courtesy requires that the objections should always be respectfully stated to the court. It is, indeed, the wiser course to ask leave of the court to interpose preliminary questions, and when a witness needs checking to ask the court to do it. So, where a rebuke is needed it is much better that the court be asked to administer it than for the counsel to take that office upon himself. It is well enough to sting a swift and unscrupulous witness by allusions, couched in courteous and not coarse terms, in addressing the court; but the advocate who arbitrarily assumes the duty of rebuking the witness is not likely to win the favor of jurors, for

[8] 3 Chitty Gen. Prac. 888.

they are slow to side with an arrogant or tyrannical lawyer. A sagacious advocate never assumes the functions of a judge, although he may drop many a hint, in asking the interposition of the court, that will find a ready entrance into the ears of the listening jurors. These hints will only be given where there is cause, for an undeserved reproach, whether directly or indirectly given, arouses a feeling of hostility that bodes no good to its author. Cunning is not always wisdom, and a course indicative of an effort to obtain an unfair advantage, where the witness is free from fault, will almost invariably work evil to him who pursues it.

These are practical hints, for with the ethical aspect of the subject we are not now concerned, further than to affirm that, as a matter of policy, an honest and upright course is always the best; so that, if an advocate is tempted to depart from honesty and right—which he never should do, we venture to say at the expense of a transient digression—let him be restrained by the consideration of expediency, if he will yield to no higher and better motive.

In stating offers to prove, counsel often get a matter before the jury in a stronger and more harmful form than they could if allowed to elicit the facts from the witness. The effort to keep out the evidence arouses the attention of the jury, and they give heed to all that passes with lively interest, so that the offered evidence is almost sure to find a lodgment in their minds, notwithstanding the fact that they may be instructed to disregard the statements, and consider only the evidence delivered to them. These statements blend themselves with the legitimate facts, and influence the minds of the jurors in spite of all that can be done. An impressive statement of an offer to prove is a very dangerous thing. It is, therefore, sometimes a matter of serious doubt whether it is better to object or let the evidence go in without objection. If, however, the evidence is upon a turning point in the case it is generally better to keep it out, and in the argument strongly enforce upon the minds of the jury that they will be guilty of a great wrong if they give heed to any evidence not legitimately before them. This is not to be done in direct terms,

since to speak of it in express terms would, in many cases, be improper, and, in all, unwise and inexpedient; but by pressing upon the attention of the jury the evidence actually before them, and by insisting that their sworn duty binds them not to look outside of it for any purpose. If adverse counsel attempt to speak of the rejected offer, there should be a prompt and determined interposition, and an instruction should also be asked advising the jury as to their duty, and indirectly rebuking counsel for adverting to matters which the jury have no right to consider.

"Have too much rather than too little evidence," is Mr. Warren's advice, and the same advice is given by others in a different form, for they say, "Overprove rather than underprove." This caution is not to be disregarded, but yet the fault of overproving on minor points must be avoided. Too much evidence on subordinate questions sometimes weakens the case, because it obscures the strong points, and because it creates a suspicion that it is only on the minor points that the case is strong. On important points, where there is conflict to be expected, the evidence can not be made too strong, for there is no danger of overproving on such points. The fact that the proof will be attacked in the strongest possible manner must be kept in mind, since the presumption must be that the opposing counsel is not wanting in ability, nor his case in strength. It is a mistake to undervalue an opponent or his case. The only safe course is to prepare to meet as strong a case as talent and industry can construct.

In concluding these practical suggestions in this connection, it may be well to observe that the nature of the case is often of importance in determining what is best to be done, and that one party may take risks when it would be very foolish for the other to do so. Ordinarily, the case should be tried with a view to appeal, that is, each party should bear in mind that an appeal may be taken by the one or the other. Each will, therefore, try to avoid error on his part and take advantage of any error, or supposed error, on the part of the other. But in some cases, as often happens, for instance, in actions against railroad companies or other corporations for damages on account of personal injuries,

one of the parties, the defendant in such a case, having no hope of a favorable verdict, may well take risks and try to get reversible error into the record. The verdict is not the only thing. It is often easy to obtain for the plaintiff in such cases, but hard to uphold. Too many advocates seem to overlook this, and take unnecessary risk in making objections, keeping out evidence, introducing doubtful evidence or asking questionable instructions, when they might easily obtain a verdict in any event.[9]

[9] See also remarks in the opinions in People v. Fiorentino, 197 N. Y. 560, 91 N. E. 195; and People v. Carcone, 185 N. Y. 317, 78 N. E. 287, criticising prosecuting attorneys for "running unreasonable, dangerous and foolish risks" in making objections which invite doubtful rulings or introducing evidence of doubtful admissibility, in order to secure a conviction.

RULES OF LAW.

Order of Introducing Evidence.

1. The order in which evidence shall be introduced is a matter resting largely in the discretion of the trial court.

Village of Ponca v. Crawford, 18 Neb. 551, 26 N. W. 365; Johnston v. Jones, 1 Black. (U. S.) 209, 17 L. ed. 117; 3 Wait's Pr. 210; Joslin v. Grand Rapids &c. Co., 53 Mich. 323, 19 N. W. 17; Marshall v. Daviess, 78 N. Y. 414; Chase v. Lee, 59 Mich. 237, 26 N. W. 483; 1 Greenl. Ev., § 74; Wells v. Kavanaugh, 74 Iowa 372, 37 N. W. 780. See also, 2 Elliott Ev., §§ 808-811.

2. Subject to the regulation of the trial court in the exercise of its discretion, a party may, as a rule, introduce his evidence in any order he prefers.

Clawson v. Lowry, 7 Blackf. (Ind.) 140; Ginn, Exr., v. Collins, 43 Ind. 271; Burns v. Harris, 66 Ind. 537; Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935; 3 Bouv. Inst. 451, § 3197.

3. The usual and proper order of introducing evidence is for the party who has the opening to first introduce all the evidence necessary to make, at least, a *prima facie* case in all respects; then

the evidence of the adverse party should be introduced to contradict, if necessary, the *prima facie* case made by the evidence first introduced, and to establish his own cause of action or defense; after which the party who has the opening may introduce rebutting evidence in denial or limitation of his adversary's case.

See Dodge v. Dunham, 41 Ind. 186, 192; Braydon v. Goulman, 1 T. B. Mon. (Ky.) 118; 2 Elliott Ev., §§ 809-816; Silverman v. Foreman, 3 E. D. Smith (N. Y.) 322; 1 Greenl. Ev., § 74; 1 Stark Ev., *382; 3 Bouv. Inst., §3224, *et seq.*

4. The court may, in its discretion, depart from the ordinary rule, and allow evidence in rebuttal that might have been given in chief.

Holmes v. Hinkle, 63 Ind. 518; Dane v. Treat, 35 Me. 198; Harker v. State, 8 Blackf. (Ind.) 540. See also, State v. Martin, 89 Me. 117, 35 Atl. 1023; Harrell v. Columbia St. Ry. &c. Co. (S. Car.), 71 S. E. 359; Humphrey v. State, 78 Wis. 569, 47 N. W. 836.

But this cannot be demanded as a matter of right, especially if both sides have once closed. Gilbert v. Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Marshall v. Davies, 78 N. Y. 414; Agate v. Morrison, 84 N. Y. 672, 673; Stewart v. State, 111 Ind. 554, 13 N. E. 59.

5. When the defendant's pleadings show that he relies on an affirmative defense, it has been held not to be improper for the plaintiff to give, as part of his case in chief, anticipatory evidence in rebuttal thereof.

York v. Pease, 2 Gray (Mass.) 282; Williams v. Dewitt, 12 Ind. 309. And see, Dunn v. People, 29 N. Y. 523; Dimick v. Downs, 82 Ill. 570; 1 Greenl. Ev., § 74.

While this course seems proper under the authorities, it ought seldom to be pursued; for it may deprive the party so doing of the right to give further evidence on the same point in rebuttal. Williams v. Dewitt, 12 Ind. 309; Holbrook v. McBride, 4 Gray (Mass.) 282; Brown v. Murray, 21 Eng. C. L. 21.

6. The party opening the case has a right, in rebuttal, to introduce any competent evidence tending to deny and defeat the case made by his adversary, although it may also tend, incidentally, to corroborate his case in chief.

Chadbourn v. Franklin, 5 Gray (Mass.) 312; Bancroft v. Sheehan, 21 Hun (N. Y.) 550.

7. Where rebutting evidence has been introduced, if any new and distinct facts are thereby developed the opposite party may be permitted to introduce proper evidence to meet it.

Kent v. Lincoln, 32 Vt. 591; Asay v. Hay, 89 Pa. St. 77; Walker v. Fields, 28 Ga. 237.

8. If evidence is incompetent merely because it appears irrelevant at the stage at which it is offered, the court may admit it conditionally upon a promise to introduce the connecting evidence necessary to make it relevant;[1] but if such evidence is not introduced as promised, a motion to strike out the evidence admitted on the faith of such promise ought to be sustained.[2]

[1] Davis v. Calvert, 5 Gill. & J. (Md.) 269, 25 Am. Dec. 282; Place v. Minster, 65 N. Y. 89; Williams v. Grand Rapids, 53 Mich. 271, 18 N. W. 811; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 50 Am. Dec. 509; Pittsburgh &c. R. Co. v. Conway, 57 Ind. 52; First Unitarian Society v. Faulkner, 91 U. S. 415, 23 L. ed. 283. See also, Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.

[2] People v. Millard, 53 Mich. 63, 18 N. W. 562; People v. Hall, 48 Mich. 482, 12 N. W. 665. See also, Heady v. Brown, 151 Ind. 75, 49 N. E. 805, 51 N. E. 85. And an instruction may be requested directing jury to disregard it. Carlisle v. Hinley, 15 Ala. 623; Rogers v. Brant, 10 Ill. 573. See also, Shepard v. Goben, 142 Ind. 318, 39 N. E. 506.

In the case of People v. Millard, *supra*, while it is conceded that the trial court has a broad discretion in admitting evidence out of its regular order, the practice is severely, and, as we think, justly, criticised, especially in its application to criminal cases.

9. Such evidence ought to be rejected unless the party offering it states how he expects to render it relevant, and promises to introduce the proper evidence to make it so.

Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491; McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; Mechelke v. Bremar, 59 Wis. 57, 17 N. W. 682. See also Express Pub. Co. v. Aldine Press, 126 Pa. St. 347, 17 Atl. 608.

10. A party ought not to divide his evidence on any fact material to his case in chief, and give part of it in chief and part in rebuttal;[1] nor ought he to partly examine one witness and then call another before completing the examination of the first witness on that subject.[2]

[1] Fitzpatrick v. Papa, 89 Ind. 18; Ashworth v. Kittridge, 12 Cush. (Mass.) 193; 1 Greenl. Ev., § 74.

[2] Beaulieu v. Parsons, 2 Minn. 37; People v. Mather, 4 Wend. (N. Y.) 229, 249.

But the witness may be recalled to testify as to new matters on rebuttal, and it is error to refuse this right. Jones v. Smith, 64 N. Y. 180, opinion, 184.

11. The court may, in the exercise of its discretion, require a party to give all his evidence on one subject before proceding to another.

Rowe v. Brenton, 3 Mann. & Ry., 133, 139.

12. Where there are several defendants, the order in which each shall present his case is generally left to the discretion of the trial court.

Fletcher v. Crosbie, 2 M. & Rob. 417; Chippendale v. Masson, 4 Camp. 174.

13. It is in the sound discretion of the trial court to permit a case to be re-opened and evidence to be introduced even after both sides have rested.

Williams v. Hayes, 20 N. Y. 58; Philadelphia, &c., R. R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Tomer v. Densmore, 8 Neb. 784; Delaney v. Mulligan, 148 Pa. St. 157, 23 Atl. 1056.

This has been permitted even after argument had begun. Curine, Dunn & Co. v. Raub, 100 Ind. 247; State v. Rash, 12 Ired. Law (N. Car.) 382, 55 Am. Dec. 420. But an exception lies for the abuse of such discretion. Meacham v. Moore, 59 Miss. 569; Meyer v. Cullen, 54 N. Y. 392. See also, Breedlove v. Bundy, 95 Ind. 319; Kirschbon v. Bonzel, 67 Wis. 178, 29 N. W. 907.

Offers and Objections.

1. If a question be objected to, or a witness challenged as incompetent, a statement of the evidence expected to be elicited may be offered, notwithstanding the presence of the jury;[1] but documentary evidence, if objected to, ought first to be presented to the judge for his ruling before it is read to the jury,[2] and the court may require the offer of oral evidence to be so made that it will not be heard by the jury.[3]

[1] Scripps v. Reilly, 38 Mich. 10; Sievers v. Peters Box &c. Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Hedlun v. Holy Terror Min. Co., 16 S. Dak. 261, 92 N. W. 31; Bagley v. Mason, 69 Vt. 175, 37 Atl. 287.

[2] Philpot v. Taylor, 75 Ill. 309, 312; Keedy v. Newcomer, 1 Md. 241.

[3] Omaha &c. Co. v. Fay, 37 Neb. 68, 55 N. W. 211; Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145.

2. The offer should specifically state the facts which counsel expects to show,[1] and, in some jurisdictions at least, this offer must be made before the court rules on the objection.[2]

[1] Over v. Schiffling, 102 Ind. 191, 26 N. E. 91; Carskadden v. Poorman, 10 Watts (Pa.) 82, 36 Am. Dec. 145, opinion, 148; Haney-Campbell Co. v. Presten &c. Ass'n, 119 Iowa 188, 93 N. W. 297; Judy v. Buck, 72 Kan. 106, 82 Pac. 1104.

[2] Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 762. See also, 2 Elliott Ev., § 887.

3. It is not error to refuse an offer of oral evidence where the witness is not present and no question is asked, especially if other circumstances indicate that the offer is not made in good faith.

Eschbach v. Hurtt, 47 Md. 61, 66; Scotland County v. Hill, 112 U. S. 183, 186, 28 L. ed. 692, 5 Sup. Ct. 93.

4. Where a document is offered generally, without objection, the whole instrument, including endorsements thereon properly connected therewith, is deemed in evidence for all proper purposes.

Miles v. Loomis, 75 N. Y. 288, 31 Am. 470; Bell v. Keefe, 12 La. Ann. 340.

But this rule may not apply to a complex document where only a part is offered complete in itself, although the opposite party may generally introduce the remaining parts. Marchand v. Coffee, 23 La. Ann. 442.

5. The ground of the objection should be specifically stated.

Cunningham v. Cochran, 18 Ala. 479, 52 Am. Dec. 230; United States v. McMasters, 4 Wall. (U. S.) 680, 18 L. ed. 311; Hamilton v. Pearson, 1 Ind. 540, 50 Am. Dec. 480; Louisville, &c., R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; McCullough *et al.* v. Davis, 108 Ind. 292, 9 N. E. 276. General objections such as that it is "irrelevant, immaterial and inadmissible," or the like, are insufficient, at least where the incompetency or inadmissibility of the evidence does not appear on its face. 2 Elliott Ev., § 883.

All objections not specified are considered waived. Evanston v. Gunn, 99 U. S. 660, 25 L. ed. 306. See also, Bennett v. Gibbons, 55 Conn. 450, 12 Atl. 99; Ohio, &c., Co. v. Walker, 113 Ind. 196, 15 N. E. 234.

But it seems that such particularity of objection is not required on strict cross-examination. Stanton Co. v. Canfield, 10 Neb. 389, 6 N. W. 466; O'Donnell v. Segar, 25 Mich. 367, 372.

An objection to a legitimate question does not reach an incompetent answer. The objection should be made to the answer. Gould v. Day, 94 U. S. 405, 24 L. ed. 232; Baines v. Ingalls, 39 Ala. 193. Usually by motion to strike out the answer or so much of it as is incompetent. Jones v. State, 118 Ind. 39, 20 N. E. 634; Bigelow v. Sickles, 80 Wis. 98, 49 N. W. 106. An instruction may also be requested that the jury disregard it.

6. The particular evidence objected to should be pointed out; for where part of the evidence is admissible, and part not, a mere general objection, not distinguishing between the legal and the illegal, will be overruled.

Pettigrew v. Barnum, 11 Md. 434, 69 Am. Dec. 212, and note, 226; Wallis v. Randall, 81 N. Y. 164; Smoot v. Eslava, 23 Ala. 659, 58 Am. Dec. 310; Day v. Henry, 104 Ind. 324, 4 N. E. 44; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686. See also, Richmond &c. R. Co. v. Jones, 92 Ala. 218, 9 So. 276; Holmes v. Turner's Falls Co., 150 Mass. 535, 23 N. E. 305; 2 Elliott Ev., § 882.

7. It is for the court to determine the admissibility of evidence,[1] and incidental questions necessary to such determination are, also, for the court.[2]

[1] Davis v. Charles River &c. R. Co., 11 Cush. (Mass.) 506; Columbia Ins. Co. v. Laurence, 2 Pet. (U. S.) 25; Allen v. State, 21 Ga. 117, 68 Am. Dec. 457.

[2] Currier v. Bank, 5 Coldw. (Tenn.) 460; Robinson v. Terry, 11 Conn. 460; Tabor v. Staniels, 2 Cal. 240. But see for exceptional cases where the very question in issue is thus raised, Swearingen v. Leach, 7 B. Mon. (Ky.) 285; Day v. Sharp, 4 Whart. (Pa.) 339, 34 Am. Dec. 509.

8. Where an objection is made to the competency of evidence, the court may, and generally should, permit a preliminary examination or cross-examination by the objector as to the facts necessary to determine the question of competency.

Trussell v. Scarlett, 18 Fed. 217, and note; Maurice v. Worden, 54 Md. 233. And see City of Ft. Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743.

It is also within the sound discretion of the court, in such case, to permit the introduction of other evidence material to such determination. Maurice v. Worden, 54 Md. 233; Commonwealth v. Howe, 9 Gray (Mass.) 110. *Contra,* Crenshaw v. Jackson, 6 Ga. 509, 50 Am. Dec. 361. See generally, 2 Elliott Ev., §§ 720-722.

9. The party to whom the ruling of the court on an objection is adverse should save an exception at the time.

3 Bouv. Inst., 475, § 3234; 3 Wait's Pr., 202. And see Stewart v. Huntington Bank, 11 S. & R. (Pa.) 267, 14 Am. Dec. 628; Reid v. Hawkins, 46 Ind. 222; McKnight v. Dunlap, 5 N. Y. 537, 50 Am. Dec. 370; Kern v. Bridwell, 119 Ind. 226, 21 N. E. 664.

10. Where there are several parties, and the evidence is admissible against any of them, the objection and exception must be by the party aggrieved, and not by all.[1] If admitted against the others, he should ask an instruction limiting its effect to them.[2]

[1] Black v. Foster, 28 Barb. (N. Y.) 387; Consolidated Ice &c. Co., v. Keifer, 134 Ill. 481, 25 N. E. 799; Keesling v. Doyle, 8 Ind. App. 43, 35 N. E. 126.

[2] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Consolidated Ice &c. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799; Vannoy v. Klein, 122 Ind. 416, 23 N. E. 526.

11. Where incompetent evidence is received without objection, it is not error to admit evidence otherwise irrelevant to meet it;[1] but this cannot generally be demanded as a matter of right.[2]

[1] Sherwood v. Titman, 55 Pa. St. 77; Blossom v. Barrett, 37 N. Y. 434, 438; Lewis v. Merritt, 98 N. Y. 206; Peck v. Goodberlett, 109 N. Y. 180, 16 N. E. 350; Perkins v. Hayward, 124 Ind. 445, 24 N. E. 1033; Hoover v. State, 161 Ind. 348, 68 N. E. 591. And see, Hogan v. Northfield, 56 Vt. 721; Gibson v. Lacy, 87 Ind. 202.

[2] Scattergood v. Wood, 79 N. Y. 263, 35 Am. 515; People v. Dowling, 84 N. Y. 478, opinion, 486; Stringer v. Young, 3 Pet. (U. S.) 320; 7 L. ed. 693; Walkup v. Pratt, 5 Har. & J. (Md.) 51.

Failure to object to incompetent evidence does not give the right to follow it up with other incompetent evidence even to explain it. Brand v. Longstreet, 4 N. J. L. 325; Lyons v. Teal, 28 La. Ann. 592. See generally, 2 Elliott Ev., § 889.

12. An exception taken by a party to incompetent evidence is not, it seems, waived or cured by his afterwards introducing evidence to the same effect.

Worrall v. Parmelee, 1 N. Y. 519, 49 Am. Dec. 350. And see Flanigan v. Lampman (Mich.), 3 Am. L. Reg., 183; Washington &c. Gas Light Co. v. McCormick, 19 Ind. App. 663, 667, 49 N. E. 1085; Salt Lake City v. Smith, 104 Fed. 457, 470, 471, 43 C. C. A. 637.

But see apparently *contra*, Graff v. Greer, 88 Ind. 122; Carter v. Fischer, 127 Ala. 52, 28 So. 376. See also, 2 Elliott Ev., §§ 888, 889. And it has been held that a party, upon whose objection evidence admissible for either party has been excluded, will not be heard to complain of the subsequent exclusion of like evidence offered by himself. Hinton v. Whittaker, 101 Ind. 344.

But where other undisputed evidence is given, clearly proving the same fact, error in admitting incompetent evidence is usually harmless. Naugle v. State, 101 Ind. 284; McKay v. Riley, 135 Ill. 586, 26 N. E. 525; Bradley v. Palen, 78 Iowa 126, 42 N. W. 623.

Withdrawing and Striking Out Evidence.

1. Where a party introduces evidence over objection and exception he cannot, as matter of right, have it withdrawn or struck out against the will of the other party,[1] but the court, in the exercise of a sound discretion, may permit such evidence to be withdrawn or struck out where it appears to be harmless.[2]

[1] Furst v. Second Ave. R. R. Co., 72 N. Y. 542. And see Erben v. Lorillard, 19 N. Y. 299; Hunnicutt v. Higginbotham, 138 Ala. 472, 35 So. 469.

[2] State of R. I. v. Fowler, 13 R. I. 661; Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713.

2. One who has permitted evidence incompetent on its face to be received without objection, when he had full opportunity to object, is not entitled as of right to have it struck out on motion,[1] but the matter is largely in the discretion of the trial court, who may instruct the jury to disregard it.[2]

[1] Simons v. Vulcan Oil Co., 61 Pa. St. 202, 100 Am. Dec. 628; Bingham v. Walk, 128 Ind. 164, 173, 27 N. E. 483; Ardmore Oil Co. v. Robinson (Okla.), 116 Pac. 191; Levin v. Russell, 42 Hand. (N. Y.) 251; Quin v. Lloyd, 41 Hand. (N. Y.) 349; Le Coulteux De Caumont v. Morgan (N. Y.), 9 N. E. 861, 865; *sub nom.* Matter of Morgan, 104 N. Y. 74; Brockett v. New Jersey Steamboat Co., 18 Fed. 156; Bailey v. Warner, 118 Fed. 395, 55 C. C. A. 329.

[2] Pontius v. People, 82 N. Y. 339; Platner v. Platner, 78 N. Y. 90. See also, Gilmore v. Pittsburgh &c. R. R. Co., 104 Pa. St. 275.

3. Where incompetent evidence of a character likely to injure a party is admitted over his objection, on promise to connect, or because apparently competent at the time, a motion to strike it out afterward interposed by him should be sustained.

Anderson v. Rome &c. R. R. Co., 54 N. Y. 334; Gilbert v. Cherry, 57 Ga. 128; Landes v. Obert, 78 Tex. 33, 14 S. W. 297.

But where capable of being rendered harmless by instructions, it has been held sufficient to instruct the jury to disregard the evidence, and not error to overrule the motion to strike out. Marks v. King, 64 N. Y. 628; Gawtry v. Doane, 51 N. Y. 84; Northampton Bank

v. Bulliet, 8 Watts & S. (Pa.) 311, 42 Am. Dec. 297; Cadwallader v. Brodie (Pa.), 13 Atl. 483.

4. It seems to be in the discretion of the trial court to permit one who has drawn out incompetent evidence from his own witness, without objection, to have it struck out.

Carpenter v. Ward, 30 N. Y. 243, 246; Farmers' Bank v. Cowan, 2 Abb. Ct. App. Dec. 88.

5. The court may, sometimes, of its own motion, strike out irrelevant evidence at any proper stage of the trial.

Montford v. Rowland, 11 Stew. (N. J.) 181; Maurice v. Worden, 54 Md. 233, 251. See also, Louisville &c. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389.

6. Where evidence received over objection and exception is afterward struck out on motion, the first ruling is generally regarded as harmless.

Price v. Brown, 98 N. Y. 388; Louisville &c. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389. See also, DuRaut v. DuRaut, 36 S. Car. 49, 14 S. E. 929. But it may not always be so. See McAllister v. Detroit Free Press, 85 Mich. 453, 48 N. W. 612; Elliott's App. Proc., §§ 699, 700.

And where a defendant unsuccessfully moves to strike out evidence, but the court subsequently offers to sustain the motion, which offer is refused and the motion withdrawn, the defendant cannot complain on appeal of the first ruling upon his motion. Louisville &c. R. Co. v. Falvey, 104 Ind. 409, 4 N. E. 908.

CHAPTER VII.

THE EXAMINATION IN CHIEF.

"It is my duty as counsel to put a question or two, and that briefly, to a witness when examining to any particular fact; and often to abstain from putting any questions at all, lest I should give an adverse witness an opportunity of damaging my case, or seem to put leading questions to a willing one."—*Cicero.*

"They will so beset a man with questions, and draw him on and pick it out of him."—*Bacon.*

Practical Suggestions.

The counsel who conducts the examination in chief must be cool, self-possessed, resolute, and deliberate. If he is alarmed, agitated, or nervous, he will embarrass and disquiet the witness, for, by a well-known psychological law, mind communicates to mind its feelings and emotions. The witness, indeed, is in a strange place, and as he takes the stand he sees many eyes bent upon him, some with no friendly meaning, and all with eager curiosity, and it is not to be wondered that he proceeds with embarrassment and trepidation. The oldest advocates, as they rise to address a jury, even in a place where they have spoken scores of times, are, for the first few minutes, not free from embarrassment, and it is not to be expected that a witness, however intelligent and truthful he may be, will take his place on the stand without a feeling near akin to fear. This feeling, too, is heightened by the fact that he knows a cross-examination must come, in which a hostile and trained examiner will endeavor to bring him into ridicule or subject him to censure.

A man who had presided over many trials, Chief Justice Bushe, having been summoned as a witness, said to one of his friends: "The character of a witness is new to me, Phillips. I am familiar with nothing here. The matter on which I come is

most important. I need all my self-possession, and yet I protest to you I have only one idea, and that is Lord Brougham cross-examining me."[1]

The witness from the very start must be made to feel confidence in his examiner and in himself. The books contain many examples of men of intelligence and of integrity becoming so confused as to be unable to testify coherently, or even intelligently. This must not be allowed to happen to any witness of reasonable mental capacity on the direct examination. It is to be prevented by conveying to the witness the impression that his examiner is strong enough to keep him from stumbling or falling. This strength the examiner may possess if he knows the witness, knows what the testimony of the witness will be, and knows the case and has confidence in it. This knowledge a previous thorough preparation will give, but without it there is little likelihood of the examiner being strong enough to give his witness the support he will so much need. The impression of strength cannot, of course, be created by direct means, but it may be created by the demeanor of counsel, by the form of his questions and by the manner in which they are asked. It is not difficult, therefore, to perceive how important it is to proceed calmly, deliberately and clearly with the examination.

It is always best to ask the witness in a deliberate manner a few simple and clear introductory questions.[2] This will give him time to collect his thoughts, and, in some measure at least, to shake off his embarrassment. These questions must be clear in form, and asked in a quiet, easy manner, but in a distinct tone, free from affectation and from indications of embarrassment. On no account must there be any flurry or excitement. It is, indeed, bad work to hurry the direct examination at any stage; from

[1] Curran and His Contemporaries (4th ed.), 443. A greater man than Chief Justice Bushe apologized for his hesitancy in answering the questions of cross-examining counsel by saying, "I am afraid of you." We refer to Henry Ward Beecher.

[2] These introductory questions may usually be direct and suggestive, for leading questions are not forbidden upon merely introductory matters. See note to Tourney v. State, 47 Am. Dec. 84; People v. Mather, 4 Wend. (N. Y.) 247; 2 Elliott Ev., § 844.

first to last it should, as a general rule, be deliberate, even slow rather than rapid, but especially at the outset must all appearance of haste or confusion be avoided. If the young advocate distrusts his command over himself, he will be wise to write out in advance a few introductory questions for each witness; but if he has prepared himself thoroughly, and believes in his case, he need not fear that he cannot, at least, get a good start. Confidence and resolution come from a knowledge of the witness and the case, and it ought not to require any written questions to enable the examiner to do his work well. In no event should the advocate write out anything more than a few introductory questions, for if many questions are written they will confuse and embarrass him throughout the entire examination.

In dealing with his own witnesses the advocate should, both in manner and in form, ask his questions in an unaffected and natural way, conforming, of course, to the rules of evidence, but yet employing neither set phrases, nor technical terms, nor fine, high-sounding words. Some advocates, the moment they enter a trial, put on a professional air—which, by the way, in general, fits them as ill as a borrowed suit of clothes can fit the borrower and still be kept on—and this, as affectation always does, detracts greatly from their power. In no part of the work of a trial does affectation so much impair the advocate's usefulness as in the examination of his own well-disposed witnesses. Naturalness in the demeanor of counsel, and in the language in which the questions are expressed, is always effective, while affectation is almost always harmful.[3] Naturalness, however, does not imply familiarity, or like of dignity and gravity. Dignity and gravity are nat-

[3] Mr. Train remarks that "a proper medium in which to converse between the lawyer and witness is sometimes difficult to find, and invariably much tact is required in handling witnesses of limited education." He also shows that this is especially true in the case of witnesses who do not understand and speak English and that interpreters, who generally give conclusions or merely the substance of what is said, are unsatisfactory, particularly upon cross-examination. Train's "Prisoner at the Bar," 238, 239. Compare also remarks of court in Nerre v. Northwest Thresher Co. (S. Dak.), 131 N. W. 721, 723. As to the practice where interpreters are required, see 2 Elliott Ev., §§ 1017-1027.

ural and unaffected in a court-room, and a witness would expect to find these things in the conduct of counsel. But dignity and gravity are by no means incompatible with simplicity. Familiarity and flippancy are unnatural in a court-room, and a flippant method of conducting an examination in chief is about as bad a method as human ingenuity can devise. The witness rightly presumes, unless he is a daft or stupid one, that he is called to the witness stand to take part in a business of serious import, and if his examination be flippantly conducted he will be disconcerted and confused, or else become as foolish as his examiner.

After the introductory questions have been asked and answered, then, directing the attention of the witness to the main fact upon which he is asked to testify, but not suggesting the answers, it is usually best to leave him, as far as practicable, to give his testimony in his own way.[4] It is, however, essential that the question which directs his attention to the principal matter should be so framed as to induce him to start in due order of time, and at the beginning; for if this be not done, confusion, if not something worse, will most likely result. Once the witness is started on the right course, the fewer the interruptions the better. It is a mistake of many advocates, old as well as young, to ply a witness with questions, since that process tends to confuse the witness, as well as to create distrust in the minds of the jurors, for they are not unlikely to regard it as a sort of pumping process to draw out matters not actually known to the witness but created by him because he believes the advocate expects that from him. Mr. Chitty, in discussing this subject, says, speaking of the witness: "It is difficult, therefore, to extract the important parts of the evidence piecemeal, but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his

[4] See, for example, Ben Hardin's examination of Reading and other witnesses in the Wilkinson case given in Carleton on Homicide, where the witness was asked to tell what he knew about the transaction, and this was followed by a few questions on particular points which were not clearly brought out or were to be emphasized.

own way to detail all the facts in due order of time."[5] This is substantially the opinion of other authors.[6]

It is by no means every case, however, in which the witness will clearly and fully state the facts within his knowledge. In some instances his statements will be confused, and when this occurs the confusion must be cleared away by appropriate questions. In other instances important details will be omitted, and questions which will call out facts supplying the omissions must be addressed to him. The effective examiner registers in his mind all the important facts, and is careful that none shall escape attention. This requires a strong and clear conception of all the facts which it is expected the witness will prove, and no man is equipped for conducting an examination in chief without such a conception. In order to avoid asking a leading question it is sometimes difficult to frame a question that will direct the attention of the witness to the omission, or enable him to remove the obscurity. But it can generally be successfully done by asking him to repeat what he has said respecting a particular part of the transaction. If, however, this course proves unsuccessful, it is better to ask leave of the court to propound a leading question, and if the judge perceives that the witness is an honest and candid one, and that the course of the examiner has been frank and fair, permission will often be granted.[7] Leave must not, however, be demanded as a matter of right, but must be prayed as a matter of favor. If denied, then again ask a repetition, but the form of the question should be somewhat changed.

An omitted fact may often be called to the mind of the witness by asking him to specifically describe a particular part of the place where the transaction occurred, or to name the persons who were present, and supplementing the question by asking the witness what was said and done. As direct questions, suggestive of the

[5] 3 Chitty's Gen. Practice, 894. But, as hereinafter stated, it is not always best to ask directly for the date.

[6] 1 Starkie's Ev., 151 (n. i.); Hints on Advocacy, 31; Ram on Facts, 330; 2 Best's Ev. (Morgan's ed.), 1109n.

[7] Vrooman v. Griffiths, 1 Keyes (N. Y.) 53; Doran v. Mullen, 78 Ill. 342.

answers desired, cannot be asked, the attention of the witness must be directed in general terms to the persons and place. This may be done without violating the general rule forbidding leading questions, as it is not improper to direct attention in non-suggestive terms to a place, person, thing or subject.[8] As Lord Langdale said, in Lincoln v. Wright: "It is impossible to examine a witness without referring to or suggesting the subject on which he is to answer."

Witnesses are apt, when left entirely to their own course, to repeat what has been said to them, and thus subject themselves to censure. If censured, it is likely to confuse and bewilder them, and it is the part of prudence for the advocate conducting an examination in chief to restrain his witness, unless he be an adverse one, to matters which it is competent for him to state, rather than to permit a rebuke to come from the court or the opposing counsel. If the witness is well disposed toward the examiner, he should be cautioned in a mild and friendly way, and never in terms of reproach. It is a good plan to preface a caution by a hint that the rules of law require him to state only facts within his own knowledge, and that every one must yield to those rules. But, whatever may be the method adopted, care must be exercised not to create in the mind of the witness the belief that he has been guilty of a positive wrong. If the rebuke or the check disconcerts him, then a few simple, commonplace questions should be asked in order that he may recover from his embarrassment and regain his composure. Where opposing counsel rebuke when rebuke is undeserved, it is politic, as well as just, to stoutly defend the witness.

Facts should come from the witness. It is, therefore, clumsy work to frame questions, even if allowed, so that the answers shall be a mere affirmative or negative. If, for instance, the advocate

[8] Best on Ev. (Morgan's ed., Id., Chamberlayne's ed.), 641 (n. i.), § 1075; Lincoln v. Wright, 4 Beavan 166; DeHaven v. DeHaven, 77 Ind. 236; Harvey v. Osborn, 55 Ind. 535. See also, 2 Elliott Ev., §§ 847, 848; Cheverness v. Commonwealth, 81 Va. 787, 800; Born v. Rosenow, 84 Wis. 620, 54 N. W. 1089. The effect of suggestion is well illustrated by Professor Munsterberg in his collection of essays entitled, "On the Witness Stand." See especially pages 175, 180-186.

asks, "Did the accused kill the deceased by a pistol shot?" and the witness answers, "Yes," the testimony is not so effective as if the killing is described in detail. Nearly allied to the error of which we have just spoken is that of checking a witness so that only a partial answer is given. In general it is much better to permit a witness to complete his answer before asking another question.[9] If he is not allowed to finish his statement his testimony will probably be disjointed and disconnected, giving it an appearance of incoherency that impairs its force. Nor is this the only evil; for, if a witness is cut off before he has finished his statement, jurors may infer that the purpose in cutting the statement off was to keep it out because it was known to be unfavorable to the examining counsel.

When a statement has once been fully and clearly made it is not, as a general rule, prudent to ask its repetition. In asking that it be repeated there is danger of creating a fear in the mind of the witness that his former statement was incorrect, and this will do much to confuse him if he be at all timid and cautious. Besides this, there is the risk of a change in the form of words, leading to the belief that there is a discrepancy between the two statements. Again, by calling out two statements there is the hazard of supplying grounds for cross-examining counsel to assume that there is an inconsistency between them, and thus enabling him to impair the force of the testimony.

A rule given by Mr. Harris is: "Never cross-examine your own witness."[10] This is a good general rule, but, like most general rules, is subject to many exceptions. The chief reason, perhaps, for the rule is that the tendency of such a cross-examination is to create doubt in the mind of the witness, for he will be very apt to infer that he is cross-examined by his own side because his examiner himself doubts the accuracy or truth of his testimony. Where the reason of the rule fails, so does the rule, and there are many cases in which it does fail. If the witness is an adverse one, or a stupid one, it is advisable to cross-examine, provided no objection is made, for if one is made it will ordinarily be sustained;

[9] See State v. Scott, 80 N. Car. 365,

[10] Hints on Advocacy, 37.

and if not sustained, the statement of the objection may induce the belief that the witness is not truthfully stating facts actually known to him, but is endeavoring to oblige counsel by fabricating facts, or by corruptly coloring them. Where, however, the answer obtained is not clearly an inadequate or imperfect one, abstain from a cross-examination. Thus qualified, the rule is as nearly without exception as a general rule can be. Another important rule is to ask no questions on examination in chief that there is not good reason to believe will be answered favorably. The advocate is supposed to be informed as to what the witness knows, and should take no chances on such examination. "Take it as a golden rule," says Mr. Crispe, "let well enough alone, and never take a leap in the dark unless compelled by dire stress."[11]

Time is generally more accurately fixed by events than by dates. Men forget dates, but remember occurrences. A man may readily recall an event, as, for instance, the death of President Garfield, and yet not be able to give the date of his death. True, something may occur to fix the previse date in memory, but, in general, dates are forgotten and only the occurrences remembered. It sometimes perplexes a witness to ask him as to a date, and unless the examiner is quite sure that the date is fixed in memory, or it is indispensably necessary to get the date, it is much better to ask for the occurrence and not for the date. Where a date is required, it is better to lead up to the question which asks for it by questions calling out occurrences that will bring the date to memory.[12] Asking directly and without prefatory questions for a date will set many witnesses off on a crooked and perplexing train of thought, for, if the witness is not a very cool and strong one, he will think he has forgotten the thing he ought to remember, or he will confuse himself by the effort to ascertain whether he does really remember the date or not. It must—we remark, at the expense of repeating what has been said—be borne in mind

[11] Reminiscences of a K. C., 231. Mr. Crispe, in the same connection, gives some examples of the fatal result of violating this rule.

[12] See Davie v. Terrill, 63 Tex. 105; Harris v. Rosenberg, 43 Conn. 227, 231; Young v. Commonwealth, 8 Bush. (Ky.) 367, 372; O'Hagan v. Dillon, 76 N. Y. 170, 173; 2 Moore on Facts, § 850.

that the ordinary witness testifies under fear of censure or reproach, and does not think deliberately like one not under constraint, so that to him a matter of no great significance seems important. This feeling keeps him in dread lest he be made to appear an ignorant or an untruthful witness. An advocate trained to think under pressure and excitement must not measure a witness's mental condition by his own.

Time does, in many cases, become a question of grave importance, yet men ordinarily measure and remember time with less precision than almost any other thing.[18] Where time becomes a question of importance, it is unsafe to call out a mere general estimate or statement, since on cross-examination a few adroit questions may completely destroy the estimate or effectually overturn the statement. In the direct examination, all the facts which give the estimate force and the statement precision must be clearly brought out. Nothing on this point should be left untouched. This rule applies, not, however, with so much strength, to all estimates of amount, of the speed of a moving object, of the force of a blow or the like, and also to estimates of size, space and distance. These estimates are, in most cases, mere matters of inference, and, unless the grounds for the inference are exhibited, the inference may be made, on cross-examination, to seem ridiculous. If the things which supply the foundation for the inference are first brought out the witness is much more likely to give a just estimate than if the bare inference, without the ground on which it rests, is given. Witnesses, even honest ones, are prone to exaggerate in matters like these, and a skilful cross-examiner will, by a merciless dissection, so expose the exaggerations as to overthrow the testimony. It is important in all cases for the counsel conducting the examination in chief to bear in mind the coming cross-examination, but this is especially important in cases where the testimony is of matters of estimates and inferences. There are cases where time, distance, space, size, speed, amounts, and the

[18] Ram on Facts, Chap. VI, § 1; James, Principles of Psychology, vol. 1, page 624. See also as to mistakes being frequently made as to dates, United States v. Louis Juen, 128 Fed. 522, 523; Louisville &c. R. Co. v. Deason (Ky.), 96 S. W. 1115, 1117.

like, are matters of positive knowledge, so far, at least, as such things can be positively known, and when this is so the direct examination must bring it out fully and distinctly.

In another place the necessity of acquiring a knowledge of the character, feelings and habits of the witnesses was enjoined upon the advocate, and the failure to observe this precaution will be sorely felt when the time comes for the examination in open court. This knowledge is especially important in the case of an over-zealous witness who persists in proving too much. If this propensity is known in advance, the questions may be so framed as to restrain this excessive zeal, or a warning may be given in private that will avoid the humiliation of a rebuke in public. But it is not possible to obtain this knowledge in every case, and when it is not attainable then the line of conduct must be decided upon as soon after the witness enters the box as possible.

An English author says of witnesses who prove too much: "They usually try to look wonderfully easy and confident, and to answer off-hand with extraordinary glibness, and give twice as much information as you have asked for."[14] It is, however, not always true that witnesses of this class wear the guise of ease and confidence. There is another and more difficult class to deal with, and that is the class composed of persons who assume to be possessed of a sort of oracular wisdom, and come upon the stand with an assumed air of sullenness and reticence. In dealing with the first class the advice given by the author referred to may well be followed when it is practicable. His advice is: "To check them at the very outset by kindly, but gravely and peremptorily, requiring them to do no more than simply answer the questions you may put to them, and then to so frame your questions that their answers shall be plain 'yes,' or 'no,' giving them no opportunity for expatiating." But it is no easy task to frame the questions as this author suggests without violating the rules forbidding leading questions, and the advocate will sometimes be driven to adopt some other method. It will be found, where the form of the questions cannot be made successful, that it will be well to draw from the court an admonition to the witness to make his an-

[14] Ram on Facts (3d Am. ed.), Appendix, 326.

swers responsive to the questions. This can be done without arousing the ire of the witness by a suggestion to the court that it is desired that the answers be taken down only so far as they are responsive, and this will, in general, draw out the desired caution. If, however, it is apparent that the witness is not likely to be so offended as to take sides against his examiner, there is no great need of delicacy or caution. The oracular witness requires more delicate handling, for his vanity is generally very great and easily wounded, and if offended he will become sullen and perverse. Rebukes and checks to such a witness, if counsel is compelled to give them, must be given in a mild and apologetic manner. Your wise but willing witness is a very difficult one to handle, unless he has been well warned in advance not to volunteer unasked statements.[15]

An adverse witness is to be sternly kept to the point, and with a strong will compelled to give only such answers as the questions call for. No fear of provoking him to anger need restrain checks and rebukes. If it is manifest that he is biased or prejudiced, the more plainly that fact can be made to appear the better. Brought out and exposed, it will do much to neutralize the effect of any unfavorable answer that he may give. "Make," says Mr. Cox, "no secret of his enmity; on the contrary, you have most to dread when his manner and tone do not discover his feelings. If you are satisfied beyond doubt of his hostility, and he should, as is often seen, assume a frank and friendly mien in the witness-box, instead of accepting his approaches, reject them with indignation, let him see that you are not to be imposed upon, and endeavor to provoke him to the exhibition of his true feelings." This advice, in the main, is excellent, but yet it is somewhat misleading, because too strongly expressed. Unless the case is an extreme one, indignation will seem a mere pretense. There are, perhaps, cases where indignation may be exhibited, but they are very rare. The fact that the witness is called by the advocate himself will, except in very unusual cases, make an exhibition of indignation seem far-fetched and theatrical, since the natural presumption is that he

[15] See also as to treatment of such witnesses and others of various kinds, Robinson's Forensic Oratory, §§ 192-196.

knew in advance that the witness was adverse, and knowing this he could not reasonably assume that the witness was seeking to impose on him. If, however, it can be unmistakably made to appear that the hostility or prejudice of the witness has been concealed, and is first revealed on the trial, then the indignation is natural, and may be given plain and energetic expression. But even in such a case there should be neither indecorous conduct nor discourteous language. Bitter, biting words may be courteous, and scorn and indignation may be decorously exhibited. The great actors are not turbulent or boisterous, but they are effective.

What has been said respecting adverse witnesses directly applies to those whose hostility or prejudice is not known until after their examination has begun, but it is also in a great measure applicable to those whose animosity is known at the time they are called. When compelled to call a witness whose hostility is known, it is advisable to bring it into full view at the earliest practicable moment, and to treat him from the beginning as though it was known. It will serve no useful purpose to beat about the bush with him, for the sooner both he and the jury can be made to understand his position the better. But in dealing with such a witness the advice of David Paul Brown is as good as can be given—"Get rid of him as soon as possible." Examine him only as to the matters on which you are compelled to call him, and far enough to fully disclose his prejudice or enmity against your client.

It will sometimes happen that a witness will make a statement unfavorable to the examining counsel, but this, of itself, will not justify an inference that he is an adverse witness, and if not an adverse witness he should be neither angered nor offended. Mr. Brown, in his Golden Rules for the Examination of Witnesses,[16] says: "If the evidence of your own witnesses be unfavorable to you (which is to be carefully guarded against), exhibit no want

[16] 1 Forum, lxxiv. Copied also in Munson's Manual of Elementary Practice, 314, *et seq.* And see "Maxim's of Examination in Chief," 55 Solicitor's Journal 165.

of composure, for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon counsel." This is excellent advice as far as it goes, but it should be added that the examination of the witness must be turned as quickly as can be done to some other point, and everything that is relevant and not unfavorable be drawn from him, even though it be of very little importance. If much can be secured that seems important, together with a few things that are really favorable, then, by a little dexterity, the favorable can be made so prominent as to diminish the force of the adverse statement, even if it does not entirely neutralize it.

An unfavorable answer ought not to put an end to the examination, unless it be impossible to proceed without increasing the mischief, for an abrupt stop leads to the conclusion that the discomfiture of counsel is utter and irretrievable. This conclusion may be avoided by calmly receiving the statement, and cleverly turning the course of the testimony in another direction without precipitately retreating. If nothing more can be done than to tone down and soften the statement, better do that than to abruptly close the examination. But if the preparatory work has been thoroughly done, the advocate ought not to be surprised by such a statement; still, as there is not always an opportunity to examine witnesses in advance of the trial, and as witnesses do not always state the facts fully, it is wise to be prepared for action in the event of a surprise. One thing is especially important in such a case as that under immediate mention, and that is, never suffer the witness on the stand, or your other witnesses, to suppose that the surprise has impaired your confidence, or weakened your self-possession. Avoid, if possible, any discomposure; but if this is not possible, let it be known only to yourself. If you lose your temper, then you will be quite sure to betray your loss of confidence, and evil will be very likely to come of it.

RULES OF LAW.

1. The evidence must correspond with the allegations of the pleadings, and be confined to the point in issue; hence, imperti-

nent and irrelevant questions should not be asked in the examination of a witness.

3 Bouv. Inst., § 3206. See also, 1 Greenl. Ev., § 50, *et seq.;* 2 Best's Ev., § 644; 2 Elliott's Ev., § 824. *In re* MacKnight, 11 Mont. 126, 27 Pac. 336; Scofield v. Walrath, 35 Minn. 356, 28 N. W. 926; Votaw v. Diehl, 62 Iowa 676, 13 N. W. 757.

As elsewhere shown, however, evidence apparently irrelevant may be admitted on promise to introduce other evidence proper to show its relevancy.

2. Leading questions should not, as a rule, be asked on examination in chief.

1 Greenl. Ev., § 434; 2 Best's Ev., § 641; Turney v. State, 8 Smedes & Marsh. (Miss.) 104, 47 Am. Dec. 74, and note, 82, *et seq.*, where the subject is thoroughly discussed and many authorities are cited.

There are, however, four well defined exceptions to this rule to the extent, at least that the courts may, and usually do, permit leading questions in such cases: (1) Leading questions are permissible, and, indeed, proper, as to points not material but merely introductory or preliminary; (2) they may be allowed where the witness appears unwilling and hostile to the party calling him; (3) they may be admissible to assist the memory of a witness where it appears defective, especially if the subject is a complicated one; (4) for the purpose of identifying persons or things, the attention of the witness may be directly called to them. See note to Turney v. State, 47 Am. Dec. 84, 85; 2 Best's Ev., § 642; 2 Elliott Ev., §§ 843-850.

But the whole matter is ordinarily left to the discretion of the trial court. Clark v. Saffrey, R. & M. 129, 21 Eng. Commonwealth L., 715; People v. Mather, 4 Wend. (N. Y.) 299, 21 Am. Dec. 122; 2 Elliott Ev., § 842. And see note in 57 L. R. A. 881, as to whether court may ask leading questions.

3. A witness should be examined and allowed to testify only as to such facts as are within his personal knowledge and recollection.

3 Bouv. Inst., § 3209; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Carpenter v. Ambroson, 20 Ill. 170; Wolf v. Arthur, 112 N. Car. 691, 16 S. E. 843.

But memoranda may often be resorted to for the purpose of refresh-

ing the memory; and even where the witness has no recollection of the matter aside from the writing, if he is so satisfied from his signature, or otherwise, that he can swear positively to the document or to the facts therein stated, his evidence, it seems, in most jurisdictions, is admissible to that extent. See 2 Elliott Ev., § 854, *et seq.;* also note in 98 Am. Dec. 619. And see note in 63 L. R. A. 164; 1 Wig. Ev., § 734 *et seq;* Pearson v. Wightman, 1 Mill (S. Car.) 336, 12 Am. Dec. 636; 1 Greenl. Ev., § 437; 1 Stark Ev. 154, 155; Russell v. Coffin, 8 Pick. (Mass.) 143; Acklen v. Hickman, 63 Ala. 494, 498; Cole v. Jessup, 10 N. Y. 96; Howard v. McDonough, 77 N. Y. 592; also Dunlap v. Berry, 4 Scam. (Ill.) 327, 39 Am. Dec. 413.

4. A witness not an expert may not, as a rule, be examined, nor testify, as to matters of opinion.

Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; 2 Best's Ev., § 511; Reed v. McConnell, 101 N. Y. 270, 4 N. E 718; Rogers' Exp. Test., § 3; Reid v. Ladue, 66 Mich. 22, 32 N. W. 916, 11 Am. St. 462, and note; 1 Elliott Ev., § 672.

But a witness may testify as to any fact, otherwise proper, that he thinks or believes to be true from his own observation or recollection, although he may not be certain of it. Blake v. People, 73 N. Y. 586; Clark v. Regelow, 4 Shepl. (Me.) 246; Hoitt v. Moulton, 21 N. H. 588; People v. Soap, 127 Cal. 408, 59 Pac. 771; State v. Seymore, 94 Iowa 699, 63 N. W. 661; State v. Ward, 61 Vt. 153, 17 Atl. 483; 1 Greenl. Ev., § 440.

There is also, an exception to the general rule in cases where the facts and circumstances are such that no adequate idea of them can be conveyed to the jury by the testimony of witnesses; and in such cases the witnesses may often give their opinion formed from special observation or knowledge of all such facts and circumstances. Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. 401, and note, 410, where many authorities are reviewed; 2 Best's Ev., § 517; Bennett v. Meehan, 83 Ind. 566, and authorities cited in opinion, 569; 1 Whart. Ev., § 512; 1 Elliott Ev., §§ 675, 676.

So, it is held, the subscribing witness to a will may testify as to the sanity of the testator at the time of executing it. Hewlett v. Wood, 55 N. Y. 634; Clapp v. Fullerton, 34 N. Y. 190. See also, Meeker v. Meeker, 74 Iowa 352, 37 N. W. 773. And there are many other cases in which opinions of non-expert witnesses have been admitted. Thus, opinions have been admitted as to the comparative health of another. Parker v. Steamboat Co., 109 Mass. 449; State v. Knapp, 45 N. H. 148; or his pecuniary standing, Bank of Middlebury v.

Rutland, 33 N. H. 414; or as to whether a person was intoxicated, People v. Eastwood, 14 N. Y. 562; or as to the value of property, Printz v. People, 42 Mich. 144, 3 N. W. 306; 1 Whart. Ev., § 447; or as to the relative capacity of a sewer, and many other like matters of personal knowledge or observation, Indianapolis v. Huffer, 30 Ind. 235; Alabama R. R. Co. v. Burkett, 42 Ala. 83. And see instances given in note to Commonwealth v. Sturtivant, 19 Am. 410, *et seq.;* Lawson's Exp. Ev., 3; and 1 Elliott Ev., §§ 677-686. But he ought, usually, first to state the facts on which his opinion is based. Carthage Tp. Co. v. Andrews, 102 Ind. 138, 1 N. E. 364.

5. On questions of science, skill, trade, or the like, persons of known experience or skill in such matters may be examined and testify as to their opinions.

1 Smith's Lead Cas. (5th ed.), 491; 2 Best's Ev., § 513; 1 Greenl. Ev., § 440; Lawson's Exp. Ev., 2; 2 Elliott Ev., § 1030. See also, as to who are experts, Taylor v. Town of Monroe, 43 Conn. 44; 2 Elliott Ev., §§ 1028, 1029.

6. An expert cannot be asked, as such, to give an opinion as to the merits of a case, especially if based on facts personally known to him but not in evidence.

Burns v. Barenfield, 84 Ind. 43; Rouck v. Zehring, 59 Pa. St. 74; Hitchcock v. Stillwell, 38 Mich. 501; Raub v. Carpenter, 187 U. S. 159, 47 L. ed. 119, 23 Sup. Ct. 72; Green v. Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117, 122; 2 Elliott Ev., § 1116. But proper facts personally known and testified to by him may be incorporated in questions and he may consider them in forming his opinion. Louisville, &c., R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389. See also, Louisville, &c., R. Co. v. Stewart, 128 Ala. 313, 29 So. 562; Skelton v. St. Paul, &c., R. Co., 88 Minn. 192, 42 N. W. 960; Kaminski v. Tudor Iron Works, 167 Mo. 462, 67 S. W. 221; Miller v. Dumon, 24 Wash. 648, 64 Pac. 804.

7. An expert may not be called upon to give an opinion from what he recollects of the evidence.

People v. Lake, 12 N. Y. 358; Craig, Admr., v. Noblesville &c. G. R. Co., 98 Ind. 109; Reed v. State, 62 Miss. 405; McMechen v. McMechen, 17 W. Va. 683, 694.

8. The proper mode in which to examine an expert is to state an hypothetical case, and question him as to his opinion upon that.

Rogers' Exp. Test., § 25. And see as to the form and nature of the question generally. Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499, and Kelley v. Richardson, 69 Mich. 430, 37 N. W. 514, together with the authorities cited and reviewed in both majority and dissenting opinions in each of those cases; also, 2 Elliott Ev., § 1117.

9. In framing the hypothetical question, counsel may assume and state the facts, within the limits of the evidence, in accordance with his theory, no matter whether they are proved by a preponderance of the evidence or not.

Louisville &c. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389; Quinn v. Higgins, 63 Wis. 664, 24 N. W. 482; Lawson's Exp. Ev., 153; Rogers' Exp. Test., 39; Goodwin v. State, 96 Ind. 550; Cowley v. People, 83 N. Y. 464, 38 Am. 464; State v. Privitt, 175 Mo. 207, 75 S. W. 457; City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338; Denver &c. R. Co. v. Roller, 100 Fed. 738, 754, 41 C. C. A. 22, 49 L. R. A. 77; 2 Elliott Ev., § 1119. But compare Nicholas v. Oregon &c. R. Co., 25 Utah 240, 70 Pac. 996, 998, and cases there cited.

But it is not proper to incorporate in the hypothetical question an opinion of another expert witness. Louisville &c. R. Co. v. Falvey, *supra*. Nor is it proper to include matters as to which there is no evidence. Davis v. Travelers' Ins. Co., 59 Kan. 74, 52 Pac. 67; 2 Elliott Ev., § 1120.

CHAPTER VIII.

THE CROSS-EXAMINATION.

"If the principles upon which a cross-examination ought to be founded are not understood and acted upon, it is worse than useless, and it becomes an instrument against its employer."

"The reckless asking of a number of questions on the chance of getting at something is too often a plan adopted by unskillful advocates, and noise is mistaken for energy."—*Sergeant Ballantine.*

"I am by trade a reader of faces and minds."—*Montagu Williams.*

Practical Suggestions.

The cross-examiner enters upon his work from a point almost opposite that at which the counsel by whom the examination in chief is conducted begins his work. The latter begins with the presumption that his witness knows the facts and will state them truthfully, and without error or mistake; the former starts upon the presumption that the adverse witness is untruthful, or is in error through mistake, prejudice or ignorance. But the cross-examiner is not to presume that in every case the witness who testifies against him does so corruptly.[1] This assumption in many cases leads to a cross-examination that does an infinite deal of harm. It is, however, necesary that in every case the cross-examiner should feel the influence of the presumption that the witness is, at some material point, at fault, or is mistaken; for, unless there is something in the testimony of the witness, or in the other testimony or circumstances, that justifies or supports this presumption, there should be no actual cross-examination, though there may be the pretense of one.

A study of the work done by the great cross-examiners shows

[1] See "Psychology for the Witness Stand," 72 Cent. Law Jour. 41.

very clearly that there are two kinds of cross-examination, as well as two methods of conducting a cross-examination, and that it is not only in manner, but also in kind, that cross-examinations differ.[2] There are, we assume, two kinds of cross-examination, and we think we are not too bold in naming one actual cross-examination, and the other apparent cross-examination.

An actual cross-examination goes into all the facts with determination and energy, is persistent and minute, while an apparent cross-examination is one that avoids the material points of the testimony, and is in reality an evasive examination designed to escape the dangers of an actual one. An apparent cross-examination keeps off on the edges and fringes of the case, while an actual cross-examination goes into the strongest parts. The one is employed where there is danger in attacking the strongholds, and a feint that will draw attention to other points is the object designed to be accomplished. The other is employed where there is a real assault upon the veracity of the witness as well as where it is the object of the examiner to show that the witness is mistaken, or to reveal his motives, show his ignorance, or bring out his statements for contradiction.

Where there is danger of doing harm by examining on really important matters, and yet it is felt that there must be something like an examination, lest it be concluded by the jury that the testimony is confessedly too strong to be met, an apparent cross-examination is proper and expedient. Such an examination should keep away from the points of danger as much as possible, and yet it must not appear to be an idle or unmeaning procedure. Many questions may be asked, and the prudent course is to ask many questions upon matters where answers do no harm. This course will do much to prevent the jury from inferring that the witness is so strong that the examiner dare not grapple with him, and it may be so conducted that, while yielding a substantial benefit in this respect, it will not be productive of injury in any other.

[2] For an interesting article on the "Art of Cross-Examination," stating and comparing the chief characteristics of many of the great English cross-examiners, and giving brief illustrations of their methods, see 29 Canadian Law Times, 1135, and 30 Canadian Law Times, 395.

It is not, however, because a witness testifies in strong terms, or with fluency, that an apparent rather than an actual cross-examination is to be adopted; but because from what is known of his character, or from what appears in his manner and his statements, it is evident that his testimony cannot be shaken either by showing a mistake or a falsehood.

Where the testimony of a witness is decidedly against the cross-examiner, it is, in general, better to challenge it by an apparent examination rather than to permit it to go unchallenged, even though it be felt that no great impression can be made upon it. Where, however, the testimony of the witness is as strong as it can be made, there is, it is obvious, not much risk in the most persistent actual examination, while there is some hope of benefit. But, even in such a case, it is necessary to be very careful not to cause strong statements to be repeated, unless it is quite certain that they can be successfully explained or contradicted. If, however, there is strong and convincing explanatory or contradictory evidence, the more often and the more strongly the witness can be induced to repeat his statements the better, provided, of course, that the examination does not weary the court or jury.

It is by no means necessary that there should be a cross-examination, either apparent or actual, in every instance. The presumption which we have said is acted upon by the cross-examiner supplies a test for determining whether it is prudent to cross-examine. If the witness states no fact that harms the cross-examiner's cause, or conflicts with his theory, then there is, in general, no reason for presuming that he is mistaken, or has testified untruthfully. If there are no grounds for this presumption there should be no cross-examination. If the advocate will ask himself the question, Is there reason for presuming that the witness has injured my case? the answer, if he reasons logically, will enable him to determine whether to cross-examine or not; for, if the answer be that there is a reason for the presumption, there should be some cross-examination, either an actual or an apparent one; but if the answer be the converse, then the witness, as a general rule, should be dismissed without a question.

It is agreed that a cross-examination should be conducted with

the greatest caution, and that where no good can come of it none should be attempted.[3] But the question first to be decided is whether any cross-examination is advisable.[4] It is advisable, as we have seen, where it is necessary to prevent the inference that the testimony is so strong as to frighten off any attack, and it is also advisable where there is hope of exposing falsehood, showing mistake, or exhibiting ignorance or prejudice. So, too, it is expedient where there is reason to believe that general statements may be toned down, or adverse facts explained. Again, it is advisable where there is strong reason for believing, in a case where the testimony does no harm, that favorable statements may be elicited; but in such a case the advocate must be very sure that favorable testimony can be obtained. If there is doubt, it should decide the advocate to refrain from any attempt at a cross-examination. If no harm is done he is well off, and it would be sheer folly to incur the hazard of a cross-examination.

A precept enforced by many authors is, "Never cross-examine without an object." As a general rule this is admirable; but the difficulty is in its application. It is doubtless true that a great fault in advocacy is that of cross-examining without a defined and settled purpose, and it is true that, in a general way, David Paul Brown is right in advising, "Never ask a question without a purpose." This general statement, however, is sometimes a cause of error, since some assume that, unless the examiner has reason to believe he can discredit a witness, he had better not undertake to cross-examine at all. It will appear, from what we have said, that this is an erroneous opinion, for there are many important things besides that of discrediting a witness that may be accomplished by a skilful cross-examination. Whatever may be the purpose, and however rapid the process, the cardinal rule is, to do no harm, even if no good is done.

The value of a cross-examination has been, in some quarters, much too highly lauded, for it is not every false witness who can

[3] Hints on Advocacy, Chap. III; Ram on Facts, 147; The Advocate, 395; 1 Forum 202.

[4] Sergeant Ballantine declares that his most effective cross-examination was a silent one. Sergeant Ballantine's Experiences, 106.

be broken down by it, however ably conducted. The truth is, there are shrewd, unscrupulous witnesses that no cross-examination will overthrow, so that the advocate who undertakes the task need not feel discouraged or dismayed if he fails, for the reports show many cases of failure where the task has been undertaken by great masters. It is, in truth, quite doubtful whether it is not the honest but weak or timid witness, rather than the rogue, who most often goes down under the fire of a cross-examination.

To break down or worry a weak or timid witness brings the advocate no credit, and does him no good. If the jury can see—and see it they generally do—that the witness is honest, their sympathies will go out to him to the sore injury of the cross-examiner's client. It is natural for good men, and such our jurors are in the main, to take sides with the weak against the strong, and the advocate is to them the strong and the witness the weak, except in very rare cases. On no account, therefore, is it politic to take advantage of the weak or timid, and certainly it is not defensible upon any honorable ground. To be sure, it is always just and always expedient, to show, if it can be done, that any witness, weak or strong, ignorant or learned, is mistaken or prejudiced, but he who does this by an exhibition of tyrannical strength will reap little benefit. David Paul Brown is right in saying, "Be mild with the mild, shrewd with the crafty, confiding with the honest, merciful to the young, the frail, or the fearful." It is the gravest of all errors to let it appear that, by cunning, or by power derived from training or position, a witness has been mercilessly worried into confusion and error. In such a case, despite themselves, the jurors will champion the weak and array themselves against the strong. Fair play men applaud, and even-handed contests men may possibly witness impartially; but contests of the strong against the feeble win friends for the feeble, and secure enemies for the strong. It is not a mark of ability to confuse the weak; it is an evidence of a want of sagacity.[5]

[5] Quoted from the text, with approval, in Wellman's Day in Court, 184. The following suggestions to lawyers copied in Law Notes for December, 1910, from 2 Michigan Nisi Prius Reports and credited to Hon. Charles

Where the witness is a bold one, and there is reason to suspect him of lying, an actual cross-examination, conducted with energy and resolution, is always expedient. But in such cases it is a mistake to go at once to the material parts of his testimony. On those parts it may be certainly assumed that the false witness is prepared. If his falsehood is exposed, it will not be by an attack on points where he has fortified himself, but on remote points which he has overlooked, or has not deemed of sufficient importance to entrench. It is in the outlying facts and circumstances that the effective work must be done. The exploration must be in the out of the way places, not in the places which the witness will think liable to assault. As the hunter beats the thickets and underbrush, so should the cross-examiner beat about among the circumstances and subordinate facts, knowing all the while of what he is in quest, and ready for it when it is found. In discussing this subject, Mr. Harris says: "You must, in other words, go to the surrounding circumstances."[6] Long before he wrote, it was written with something more of distinctness: "The most effectual method is to

R. Brown, contain much good advice, although some of them may be subject to exceptions:

"Never ask the same question more than twice to the same witness. If he tries to evade your question, the jury and court can hardly fail to discover it, and will weigh the testimony according to its merits. By pressing even an unwilling witness to an unreasonable extent, jurors are very apt to get the idea that you are trying to persecute, or that you are hard pressed to make out your case. The cross-examination of an honest witness should be conducted with candor, and the questions put should be directly to the point in issue. A different course of examination is almost sure to prejudice a jury against the attorney, and too often, it is feared, against his innocent client. In the cross-examination of a witness whom you believe to be dishonest, it is well to measure his mental calibre before opening your broadside upon him. Too many attorneys take it for granted that they are so much sharper than the witness that they will have no difficulty in exposing his falsehood; when, in fact, it often happens that the questions put only serve to point out to the witness any inconsistencies that may have appeared in his testimony in chief, and thus enable him, so to speak, to cover his tracks with fresh falsehoods." See also, Crispe's Reminiscences of a K. C., 238, 240.

[6] Hints on Advocacy (8th ed.), 63.

examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with a falsehood ready made."[7]

As clear and valuable a general rule as can well be given on the subject of distinguishing truthful witnesses from the untruthful is that of an English author who says: "Thus, while simplicity, minuteness and care are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually labored, cautious and indistinct. So, when we find a witness over-zealous on behalf of his party, exaggerating circumstances, answering without waiting to hear the question, forgetting facts wherein he would be open to contradiction, minutely remembering others which he knows can not be disputed, reluctant in giving adverse testimony, replying evasively or flippantly, pretending not to hear the question to gain time to consider the effect of his answer, affecting indifference, or often vowing before God, and protesting his honesty, we have indications more or less conclusive of insincerity and falsehood. On the other hand, in the testimony of witnesses of truth, there is a calmness and simplicity, a naturalness of manner and unaffected readiness and copiousness of detail, as well in one part of the narrative as another, and an evident disregard of either the facility of vindication or detection."[8] But no general rule can be laid down that can be accepted as a sure guide. The age, the disposition, the intelligence, and the habits of thought of persons so greatly differ that no rule can do more than suggest the usual indications of truth or falsehood. Some of the most truthful men are slow of speech and cautious everywhere. Some are ready and quick, some are slow and dull. Indeed, it is generally the witness with the ready-made story that is fluent and quick. Nor do we quite agree with the author that minuteness of detail is always, or even generally, a mark of truth; on the contrary, we believe it is the truthful witness who, in ordinary cases, forgets the details, and not the one who fabricates his story. But here,

[7] Alison's Pr. Cr. L., 257. See also Scintallæ Juris., 82.
[8] Taylor's Ev., 69.

again, there is no general rule. The nature of the case, the mental capacity and habits of the witness, his behavior on the stand, must be looked to rather than abstract rules. Important as it is for the cross-examiner to measure his witnesses, there is no invariable standard by which he can test the accuracy of his judgment. The best that even the most experienced cross-examiner can do is to bring to mind the indications that are usually found in the testimony and conduct of the false witness, and compare them with the testimony and behavior of the witness before him, making due allowance for mental capacity, habits of thought, mannerisms and character. Of course, if the previous history of the witness is known that will exert a great influence on the decision of the counsel who is laying out his line of cross-examination.

Where the cross-examiner concludes that the testimony of the witness is false in all its material parts,[9] and resolves to examine on that hypothesis, it is better, as a general rule, to conceal from the witness the view taken of his testimony, and to treat him at the outset as if no suspicion of his untruthfulness existed. Let the witness believe, at the start at least, that his testimony is invulnerable. For this reason, begin with commonplace questions, and ask them in an indifferent, perfunctory manner.[10] If these questions are answered without flippancy or impudence, let there be no change in the manner of asking them; but they must go deeper and deeper into the outlying circumstances. If, however, the witness becomes, as such witnesses often do, defiant and bold, then, as David Paul Brown somewhat extravagantly says, "be a thunderbolt to him," or, as Mr. Carpenter still more extravagantly says, "go down upon him like an avalanche." If the witness gives cause for anger, be angry in ap-

[9] See also as to cross-examination of perjured witness, 17 Case and Comment 450, 509.

[10] In Crispe's Reminiscences of a K. C., 153, an instance is given where a child made an apparently truthful and prepossessing witness on examination in chief; but the opposing counsel said: "I do not propose to cross-examine the witness, but, Jane, tell it us all over again, that's a good child." And she repeated her story word for word, thus giving the impression, which was true, that she had been coached by her parents.

pearance, if you will, but not in reality, since the angry man is not the wise or the cunning one. If the provocation comes from the witness the passion will seem natural and just, and will warrant something like a savage course in dealing with him.

Mr. Harris says: "It will be clear that, to examine with anything like success, the most thoroughly good temper should be preserved. A calm, imperturbable temper is the very triumph of self-command, and one of the very foremost qualities of a good advocate." This is excellent, but where there is real cause for anger, it will be natural, and what is natural is seldom hurtful, so that, if there is real cause for anger it will do no harm to let it appear. Indeed, it may do good, for the emphasis of passion is very impressive; but, angry as the examiner may seem, he must never lose his self-control. That he must maintain, or utter discomfiture will humiliate him. An angry examiner is no match for a cool witness, much less for a rogue who is prepared for a conflict. No rebuffs or checks must turn the examiner from his course when it has been once entered on. On this point the advice of Mr. Cox is admirable: "But patience in the pursuit is always necessary. You may be baffled once and again, but be careful never to let it be seen that you are baffled. Glide quietly into another track and try another approach. No false witness is armed at all points." In substantial harmony with this is the opinion of Mr. Harris, who says: "If you know nothing as to character you must proceed to test him by surrounding circumstances, leading the witness on and on, until, encouraged by his apparent success, he will tell you more than he can reconcile with fact, or with the imagination of the jury."[11]

In conducting an examination in chief, order is the rule; but in conducting the cross-examination of a witness believed to be

[11] Hints on Advocacy, Chap. III, § 8. "In cross-examination," says Judge Foley, referring to Lincoln, "he would first secure the witness' good will and then lead him gently along until he had elicited from the witness the truth for which he was seeking." But Sir Charles Russell went directly to the point, and his advice was to "go straight at the witness and at the point without finesse." O'Brien's Life of Lord Russell, 101. Much depends, we think, upon the particular witness and the circumstances. See also Crispe's Reminiscences of a K. C., 237, *et seq.*

lying, disorder should be the foundation of the method of procedure. The questions should not be asked in orderly sequence, but should be scattered, with as little connection as possible, over the entire subject of the examination. On this subject no better advice can be given than that of Mr. Cox, who says: "Dislocate his train of ideas, and you put him out; you disturb his memory of his lesson. Thus, begin your cross-examination at the middle of his narrative, then jump to one end, then to some other part, the most remote from the subject of the previous question." Again, this author says: "When you are satisfied that the witness is drawing upon his invention, there is no more certain process of detection than a rapid fire of questions." This embodies the experience of the authors who have written upon this subject, and may be accepted as the correct general rule, although it is by no means without exceptions.

It is seldom that the testimony of a witness is false in all its parts. In general, there is a blending of truth and falsehood.[12] This is quite as harmful as a complete fabrication, and is generally more difficult to detect and expose.[13] Many witnesses will not scruple to create a false impression by an evasion who would hesitate to testify to a story positively false. David Paul Brown thus illustrates this phase of false testimony: "The question is asked, 'Were you at the corner of Sixth and Chestnut streets at six o'clock?' A frank witness would answer, perhaps, 'I was near there.' But a witness who had been there and was desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers, 'No,' although he may have been within a stone's throw of the place, or at the very place within ten minutes of the time."

Dr. McCosh gives these apt illustrations: "A person is

[12] See Brown v. Brown, 63 N. J. Eq. 348, 353, 50 Atl. 608; Waterhouse v. Lee, 10 Grant Ch. (U. C.) 176, 187; 2 Moore on Facts, § 1096.

[13] Port Royal Logic, 282. "Nothing," it has been said, "is more deceitful than half the truth." Sanborn, J., in Moline Plow Co. v. Carson, 72 Fed. 391, 392, 18 C. C. A. 606. As Tennyson says: "A lie which is all a lie may be met and fought with outright. But a lie which is part of a truth is a harder matter to fight."

charged with having struck another with a stick of wood, to the danger of his life, and he replies that he did not injure him with a stick, though he was conscious all the while that he did so with a bar of iron. Or some one is charged with having done a base act on a certain day in the forenoon, and he denies it because he did it after twelve o'clock."[14] But evasions are of such every-day occurrence that illustrations seem little needed, and yet few things are more difficult to run down and bring to light than an evasion made for a corrupt purpose. If, however, a witness who gives an evasive answer be closely watched he will, in many cases, betray himself by a peculiarity of emphasis, or by a slight wincing. The evasion is a tender spot, and a slight touch often makes him flinch. The only course, where there is reason to believe the witness is endeavoring to deceive by evasive answers, is to press him with questions until he is driven to the fact, and no way of escape left open. Keep him to the matter until he has exhausted all his artifices and subterfuges, and the truth will come out, or else his equivocations and shiftings will condemn him as unworthy of belief. In dealing with such a witness, especially if he be a cunning one, the inexperienced advocate makes the mistake of giving up the chase too soon, or is led off from it by some crafty artifice. This mistake should never be made, for once the examiner has undertaken to obtain a direct and full statement of a fact he must persist, regardless of rebuffs and checks, with an eye single to the purpose which he has undertaken to execute.

Witnesses sometimes designedly give a color to their testimony, making it, in law as well as in morals, as essentially false as if it were destitute of every element of truth. This is done by witnesses, too, who would shrink from lying outright, and who quiet their consciences much as does the man who fights off the truth by an evasion. In business, in politics, and, indeed, in social life, we have this form of falsehood; but in a judicial investigation it assumes a more evil and corrupt form. This coloring is given the testimony by intentionally withholding or ob-

[14] Logic, 179.

scuring part of the truth, or by distorting and enlarging what is stated. The form in which this phase of false swearing most frequently appears is that of exaggeration.[15] An intentional exaggeration made for a corrupt purpose is, of course, false swearing in the strongest sense of the term; but exaggeration, although in fact false, when not proceeding from an evil motive, is somewhat different. The detection of a corrupt exaggeration is sometimes accomplished by leading the false witness to repeat and enlarge his exaggerations, and then, by a quick, sharp turn, suggest some comparison that will clearly exhibit to the witness himself the falsity of his statements. When this can be done, as has often happened in cases of estimates of time, speed, distance, values, amounts, and the like, the witness is very likely to go to pieces on all other questions. But it is not every case in which this course can be successfully pursued. When it can not be pursued with success, then it is sometimes prudent to probe vigorously and relentlessly for the naked facts. If, however, the facts which are believed to be corruptly colored or exaggerated can be shown in their true light and colors, then the better course is to draw on the witness to enlarge and color as much as he will. For this purpose it is not bad policy to imitate, in some degree, Judge Porter's course with Guiteau, and assist the witness as much as possible in showing his supposed superiority. With such witnesses stratagem is justifiable, since it is truth that is sought.

The witness who is not so much hardened as to be willing to swear to a lie outright, and yet is unscrupulous enough to convert truth into a lie, is a weak witness if once his vulnerable point is pierced. If he can be made to feel that he has been fully detected on one point, then it is not difficult to discomfit him on all points. For this reason it is sometimes politic to let him understand fully that his false statements have been detected and exposed, and thenceforward deal with him with no gentle hand.

[15] Biased witnesses, as Lord Stowell said, "often make mountains out of mole-hills." Evans v. Evans, 1 Hag. Cons. 35, 69, 4 Eng. Ecc. 310, 326. See also, *In re* American Board, 102 Me. 72, 66 Atl. 215, 227.

The difficulty, however, is in finding the defenseless point, for such witnesses are very often as cunning as they are unscrupulous.

One of the great perils of a cross-examination is that of bringing out some incidental circumstance that confirms or corroborates the statements made by the witness during his direct examination. A fact incidentally mentioned, although intrinsically of little weight, will very often strongly reinforce the testimony of the witness. Many illustrations of the strengthening of the testimony of a witness by the mistake of a cross-examiner are given in the books.[16] A fact elicited on cross-examination seems stronger than when brought out on the examination in chief, for it will appear, unless great care is taken, to be a part of the cross-examiner's own evidence. So a circumstance or subsidiary fact coming out on cross-examination seems undesigned, and undesigned testimony is generally stronger than that designedly and deliberately given.[17] This danger must, of course, be encountered in every case where the cross-examination proceeds upon the hypothesis that the witness has testified falsely, but it must be encountered, or there can be no actual cross-examination. The danger is not very serious if care is taken to keep away from the important facts and among the minor ones until some fact is disclosed, or some statement made, which appears not to be true. If it can be discovered that on some parts of the subject the witness seems uneasy and ill at ease, the policy is to keep to that part, and away from the ground on which he seems to feel safe and confident. No rule can be given that will enable an advocate to discover on what part of the case the witness is weak and on what strong, but it may be said that a keen scrutiny will almost always reveal some indication of alarm or distrust. A slight toss of the head, a change of color, an alteration of the tone of voice, or a flinching of the person, will sometimes betray the place where the witness feels himself weak.

Mr. Harris says: "It is a good rule never to ask a question

[16] Proffatt's Jury Trials, §§ 236, 238; Ram on Facts, 148, 149; Hints on Advocacy, Chap. IV. See also, Western &c. R. Co. v. Evans, 96 Ga. 481, 23 S. E. 494.

[17] Whately's Rhetoric.

the answer to which may be adverse to your case."[18] If he means by this an answer which will be decisive of the case, then the rule is a good one; but if he means not to ask a question where there may be an adverse answer, the rule can not be given practical effect without abandoning all actual cross-examination. It certainly would be folly to put it in the power of an adversary's witness to decide the case against the examiner, and a question which should call for an answer that may be decisive ought never be asked if any other course is open. It is better, where there is fear of an unfavorable answer on a controlling question in the case, to keep away from the matter by directing attention to facts remotely connected with it, leaving it for the jury to construct their own conclusion. Let the witness state only the facts and circumstances, and in no event require him to expressly state the conclusion, unless, indeed, it is in a case where he can be sucessfully contradicted, or where, by some other means, his statement can be shown to be unworthy of belief. It is obvious that, where nothing but adverse answers are to be expected, no examination should touch upon material points, nor, indeed, should there be any cross-examination, actual or apparent, except where an examination is necessary to prevent the appearance of confessing the strength of the testimony to be so great as to deter any attack, and except, also, where there is reason to believe the statements can be completely demolished, or the witness successfully impeached. If either of these two things can be done, then, as we have already suggested, the more strongly the witness can be made to commit himself the better.[19]

We have spoken of cases where no cross-examination is advisable, and to those we may add another, and that is, where the manner and behavior of the witness are such as to discredit him, or the improbability of his testimony is very great. Where this is so, it is politic to dismiss the witness with some remark indi-

[18] Hints on Advocacy (8th ed.), 56.

[19] See Russell's Cross-Examination of Piggott, given in O'Brien's Life of Lord Russell, 294, *et seq.* Compare, however, the cross-examination of Miss Martinez by Mr. Joseph Choate in the case of Martinez v. De Valle, given in Wellman's Art of Cross-Examination.

cative of the conviction that his testimony needs no attention.[20] It is obvious that this course is only advisable where it is quite clear that the testimony is undeserving of notice. There is another case where no actual cross-examination is advisable, and that is where it is forborne because it can not be conducted without wounding the feelings of the witness. In such a case, however, the motive which dictates the forbearance must appear, and the witness must be one who it can be seen would suffer from a further examination. Of course, if the testimony can not be overcome by other evidence, and there is hope of impairing its force, there must be a cross-examination, but it can not, as a general rule, be too delicately conducted. If it is resolved to dismiss such a witness without an actual cross-examination, the apparent examination should go far enough, and only far enough, to disclose its painful character, and supply a reason for the motive which induces counsel to forbear prosecuting the examination. A merciful consideration for the feelings of a witness who must speak of things that give pain is a sure way to a juror's favor.

It is not always safe to press a question upon a witness who manifests a disinclination to answer. Whether it is or is not safe must depend upon the peculiar circumstances of the case. If it is apparent from the conduct of the witness, or from the general scope of his testimony, that his reluctance proceeds from a desire to give the examiner no comfort, then press the question with decision and energy. But it should never be assumed without good reason that this is the cause of his reluctance. If the reluctance proceeds from a fear that he will expose himself to censure or disgrace, do not press him if, while his answer may bring disgrace, it will also bring sympathy. If it brings sympathy, it will produce evil not easily remedied.

Never expect an adverse witness to give an entirely favorable answer. If he is drawn so near a favorable answer as that pre-

[20] Judge Williams in his Legal Ethics, 138, also suggests this course in such cases. So, it is well to stop at the right place with some favorable answer, if possible, or something that shows the unfavorable witness in a bad light.

vious harm is neutralized, or positive good, even though it be not very great in degree, is accomplished, be content. There are, perhaps, a few witnesses so entirely candid and fair that they will answer as fully and favorably for the one side as for the other, but the rule is decidedly the other way. Whatever may be the reason for the desire of witnesses to benefit the side that calls them, the fact is that this is their desire in a great majority of cases. It is true, in by far the greater number of cases, that witnesses become partisans. On the presumption that they are partisans the cross-examiner should act until something occurs to countervail this presumption. One reason, perhaps, why witnesses, as a general rule, become partisans, is this: They feel complimented by the confidence reposed in them, and resolve that, if possible, they will do no harm to the bestower of the compliment. We are not now speaking of cases where there is a decided motive, as bias, interest, passion, kinship, or the like, but of cases where there is no real reason why the one side should be favored rather than the other. Small considerations move men to befriend one party and injure another; not always, nor, indeed, often, inducing them to tell a deliberate falsehood, but very often inducing them to withhold something of the truth, evade parts of it, and color other parts. Where there is no reason for partisanship, except the simple fact that the adverse party has had confidence enough in the witness to submit his testimony to the jury as that of an honest man, worthy of belief, there should not be a single question as to motive or prejudice, since in every such case the answer will be, in some shape or form, a profession of candor and impartiality.

It is not safe, as a general rule, to ask an explanation on cross-examination. Mr. Harris says: "Another item I would venture to give is, not to cross-examine for explanations."[21] It is true, as the remark of this author suggests, that it is seldom safe to ask an explanation, but this is a general rule to which there are many and notable exceptions. There may be cases, and there are cases, where an explanation is the very thing a witness can not give. Thus, in a published case, a witness testified that a

[21] Hints on Advocacy (8th ed.), 59.

man was struck on the left side of the face while stooping and looking westward, and yet he also testified that the train which struck him came from the east, and that the injured man was on the south side of the track. In such a case it is manifest that an attempt at an explanation would entangle the witness in a difficulty from which he could not escape. Where, therefore, the witness has been brought to a point where no explanation is possible, and there fastened, it is prudent to call for an explanation.[22] So, too, where a matter is complicated, a demand for an explanation may often reveal the falsity of the testimony. Where, however, the matter is one of which a cunning witness can give a plausible explanation, then none should be asked; but in argument it should be shown that no satisfactory explanation is possible.

It is more important than inexperienced advocates are apt to suppose, not to permit the witness to know that the examiner has succeeded in detecting his falsehood. If he discovers anything in the examiner's face or tone, he will at once endeavor to correct, modify or explain; but if he sees nothing to excite suspicion, he will exhaust his cunning in endeavoring to anticipate and prepare for what is coming. The dishonest witness generally feels the insecurity of his position, and looks for danger in advance. If the questions "come not single spies, but in battalions," trending forward with rapidity, he will not discover a statement that will undo him, but will look in the direction the questions point. If, however, he discovers, by word or look, that he has given the counsel an advantage, then will come explanations, corrections, or withdrawals, that may deprive him of his advantage. There is an exception to this general rule, and that is where the witness is fastened so that he can not escape; then indignation at his falsehood is natural, and seems natural, and the fiercer, within the bounds of propriety, he is dealt with, the better. But it is not often that a wary rogue can not explain or modify his testimony when he sees his position. Better leave his inconsistencies or contradictions for comment in argument than give him an op-

[22] See Russell's cross-examination of Piggott as given in O'Brien's Life of Lord Russell, 294, *et seq.*

portunity to explain, where there is a probability that a plausible explanation can be made.

In many ways it may be shown that the testimony of a witness is unworthy of belief. This is the central point. It is not so much the purpose of a cross-examination to make it appear that even a false witness is guilty of perjury as it is to show that he is not trustworthy. If it can be shown that his testimony is unworthy of belief, all that is of real value has been accomplished. It is not necessary that the cross-examination should go to the extent of fastening willful perjury upon the witness in order to be successful. In truth, it is only in very strong cases that it is prudent to so fasten the witness as to require the conclusion that a disregard of his testimony is an imputation of perjury. Nevertheless, there are such cases. In general, however, it is better not to push the witness into such a situation, for jurors are reluctant to impute perjury to any witness. It may be shown that the witness is unworthy of belief because his testimony is intrinsically improbable. It has, indeed, been shown that witnesses have stated things as facts that were physically impossible, and when this is the result, of course the inference must be that they are guilty of perjury. This was done in the case of the witness who testified that a designated amount in silver coin was carried a long distance by a party to the action, and a calculation made by counsel showed that the load was greater than a man could carry. It has been done in other cases.[23] But it will seldom happen that the facts testified to by the witness can be shown to be physically impossible. It does, however, frequently happen that the story of the witness is so improbable as to fall of its own weight. Men have testified to seeing objects when, because of darkness, or of obstacles, or by reason of the position they occupied, it was improbable that they could see them.[24] So, too, they have testified that injuries or wounds were inflicted in a manner so clearly improbable as to make their story unworthy of belief.

It is, therefore, of great importance to bring out the details

[23] Best's Evidence, §§ 654, 655.

[24] See 1 Moore on Facts, § 286, *et seq.*

of time, place and position, since from these may often spring inferential facts which take from the testimony every vestige of probability. This can not be successfully done unless the counsel has in his own mind a clear and distinct conception of the scene or transaction the witness assumes to describe. This conception, if not supplied by materials gathered during the work of preparation, must be secured during the examination in chief, and this, it is obvious, demands that the mind be put to intense and exacting work. For this reason the counsel who expects to cross-examine should not take full notes. All that he can do is to take notes in the briefest possible form, for his eyes must be constantly upon the witness. As Mr. Harris says: "A cross-examination may be almost regarded as a mental duel between advocate and witness,"[25] and the advocate who takes his eyes from the witness is as likely to be worsted as the swordsman who lets his eyes wander from his adversary.

Where the witness testifies to facts upon which he can not be contradicted, and declares that he can not remember as to matters upon which he can be contradicted, the better course is to make as prominent as possible the facts which he asserts he does not remember. The more he can be made to dwell upon those he does profess to remember, and the more positively he can be made to assert them, the better. If from his own testimony it can be shown that he is positive and bold where there is no fear of contradiction, and seeks shelter under the plea of forgetfulness, a great point of vantage will be gained. Lord Brougham, in securing from the Italian witnesses the often repeated "*Non mi ricordo,*" did much for the cause of his royal client. A witness who is driven to say again and again, "I don't recollect," is not far from overthrow, even though in other things he may acquit himself with apparent credit, and even though it may not appear that he is in no danger of contradiction on the things he professes to have forgotten, unless, indeed, the things he professes not to recollect are such as, under the circumstances, he would not likely remember, or unless they are of such little importance as not to be likely to have made any impression on his

[25] Hints on Advocacy, 49.

mind. The common refuge of many false witnesses is a profession of inability to remember anything beside their prepared story, and when well brought out the assertion of this inability can almost always be made a ground for distrusting the veracity of the witness, and sometimes unjustly, for honest witnesses are suspected, and even discredited, because of a frequent repetition of "I don't recollect."

The importance of ascertaining the motives of a witness believed, with reason, to be improperly or corruptly influenced or biased by them, is so manifest that there is little need to do more than suggest it. Jurors are not likely to believe that a witness has fabricated his story, or has willfully evaded the truth, or has unduly exaggerated it, unless there appears to them to be some reason for his doing so.[26] It is well to show interest, bias or prejudice at the earliest point practicable in the cross-examination, and to make it as prominent as possible.[27] This is plain enough, but it is not so easy to point out the method of doing it in every case. There are, to be sure, many cases, where enmity, kinship, intimacy in business or social relations, a unity of belief and interest, or the like, are known, where the work is plain and free from difficulty, but there are other cases where the work is perplexing and hazardous. If a witness whose motive is hidden, and not discoverable so as to be contradicted by other evidence, is directly asked as to its existence, he will, with some show of indignation, very likely, deny that any improper motive influences him, and will profess that there is no reason why he should do otherwise than speak the truth. In some instances such a witness can be nettled into protesting too much, but in most cases this can not be successfully accomplished. Whether it can or can not can only be determined from the manner of the witness and the nature of his testimony. In case of doubt it is better to resolve against making the attempt. Another course is to approach the subject of motives obliquely and indi-

[26] Ram on Facts, 157-170. "Even an untruthful man will not usually lie without a motive," says Engernd, J., in Gates v. Kelley, 15 N. Dak. 639, 110 N. W. 770, 773.

[27] Hints on Advocacy, 50-51.

rectly, and, by getting at the associations of the witness, his general prejudices, his habits of thought, and the like, a trail may be struck which will lead to the discovery of the motive which influences him. Where this course is adopted it is, in general, better to leave the facts for comment in argument rather than venture a direct question on that point.

A discussion of the things that create bias or prejudice would, it is obvious, be out of place here, but it is not irrelevant to suggest that some men are influenced by causes that to more liberal men seem utterly inadequate and insignificant. It is a mistake to suppose that only the dominant passions, such as love, anger or revenge, move men to give false testimony, for far subtler influences are often the causes of untruthful testimony. This is illustrated in cases of class against class, such as the lessor against the lessee, in cases of sufferers from a railroad accident against the corporation, in cases of the men of one school of medicine against the other, and the partisans of one faction of a neighborhood disagreement on a mere abstract question against the partisans of the other faction. It is in cases where this subtle influence is at work that the task of cross-examining as to motives needs to be done with great delicacy and care. In such cases a direct question would sometimes be fatal to the purpose of the examiner, since it would seem to the jurors that a motive founded on a cause so insignificant would not lead men to give false testimony. There is, too, the risk of running counter to the prejudices of some of the jurors, who may yield to the same influences that the witness does, and should this occur the result would be that a mere passive opposition would be stirred into active hostility and stubborn resistance. Where there is danger of such a result, better no questions, direct or indirect, upon the subject of motives.

Inferences are often stated as facts. Witnesses themselves sometimes mistake their own conclusions, derived from inferences, for the actual facts.[28] Thus, a witness will swear that

[28] See Professor Münsterberg's account of his experience as a witness where his house had been burglarized. On the Witness Stand, 39. His inferences, stated as facts, were nearly all wrong and he acted on insuf-

the defendant gave the horse a dose of medicine and killed it; yet this, in the main, is a mere process of inference, for all the facts known to the witness are that the defendant administered the medicine, and that the horse died. All else is mere matter of inference. Men are prone to mingle inferences with facts. Mr. John Stuart Mill points out this tendency to blend fact with inference, saying, among other things: "The difficulty of inducing witnesses to restrain within any moderate limits the intermixture of their inferences with the narrative of their perceptions is well known to experienced cross-examiners, and still more is this the case when ignorant persons attempt to describe any natural phenomenon. 'The simplest narrative,' says Dugald Stewart, 'of the most illiterate observer involves more or less of hypothesis; nay, in general, it will be found that in proportion to his ignorance the greater is the number of conjectural principles involved in his statements.' "[29]

It may be that in the majority of cases no good can be accomplished by separating the facts from the inferences, for the latter follow so clearly and undeniably from the former that they have all the force of actual facts. Thus, if the witness should testify that he saw the accused knock the prosecutor down with a bludgeon, there would be little good accomplished by showing that the only facts observed were the blow and the fall of the prosecutor. But there are cases where it is very important to keep the facts separated from the inferences. Thus, if the witness should testify that a train of cars ran off the track because the engineer was not at his post, it would be quite important to separate the facts from the inference. So, if the witness should testify that he saw the accused with a gun in his hand lying in wait on the roadside for the deceased, it might be very essential to detach the fact from the inferential conclusion.

It is, indeed, evident that the line between fact and inference is often very indistinct, and that in many cases the line between

ficient observation. See also, Gross, Criminal Investigation, 66, quoted in 2 Moore on Facts, § 701.

[29] Logic, 546; Jevon's Elements of Logic, 236; Bowen's Logic, 430; Whateley's Logic, Appendix, 45; Ram on Facts, 158n.

inference and opinion is not much more distinct. A witness who swears that he saw a man running states a fact, but if he adds that he was running from another he states an inference; and if he further adds that he was running at a speed of ten rods a minute he expresses an opinion. Fact, inference and opinion are often so interfused as to pass for matters of pure fact, and a compound of this character is very apt to deceive all except the closest observers. Witnesses who appear to be swearing to matters of fact are often in reality swearing to matters of inference and opinion.[30]

A witness moved by interest, bias, or prejudice, needs incessant watching, for, unless checked, he will give inferences whenever he thinks it will aid the party with whom he is in sympathy or injure the party against whom he is biased. Where, therefore, the witness is strongly in sympathy with the adverse party, it needs close attention to keep him from foisting his inferences and opinions on the jury. These sometimes do harm, for they go to the jury as facts, and, mingling with the other evidence in the case, give it a color that sometimes very much augments its strength.

A witness whose bias or passions induce him to put forth his inferences and opinions as facts will acknowledge them to be such with reluctance; but a self-deceived and honest witness will readily admit his error when it is pointed out to him. In cross-examining a witness of the latter class who has testified with fairness and candor, it is just as well to plainly exhibit to him his error, and ask its correction. With a witness of the former class a different course must be pursued. He must be made to state each specific fact, and not be permitted to explain or enlarge, nor allowed to give answers not strictly responsive to the questions propounded to him. When the facts are thus brought out in detail, then it is sometimes well enough to put it at him with something of sternness if he has not stated opinions and inferences instead of facts. Of course, where, as in the example we have given, the inference follows so closely

[30] See observations to this effect in Pierce v. Brady, 23 Beav. 64, 70; Matter of Wool, 36 Mich. 299, 302.

and so surely from the fact, it would be useless to attempt to exhibit the error in blending fact and inference.

Witnesses are often mistaken, but they are seldom guilty of perjury.[31] It is unintended error rather than deliberate falsehood that makes human testimony unreliable. There are, it is true, many false witnesses, but there are many more whose deviation from the truth is attributable to mistake rather than to intentional wrong. In by far the greater number of cases it is safe to assume that a witness who does not correctly state the facts is himself deceived, and is not influenced by corrupt motives. If, therefore, there is nothing known of the character of a witness that subjects him to suspicion, and nothing in his demeanor or the substance of his testimony that justly excites a belief that he is testifying falsely, the better course is to assume that he is mistaken, and cross-examine on that assumption.

A witness called to testify as to matters of fact is presumed to speak only of what he has perceived and remembers. Two things are, therefore, essential to invest the witness with a knowledge of facts—a correct perception and an accurate memory. A third thing is essential to give validity to his testimony, and that is an accurate communication of what he has seen and remembers. There are, therefore, three principal sources of error: in the perception, in the memory, and in the narration.[32]

In ascertaining whether the error is in the perception it is necessary to know the ability of the witness to observe what he testifies he saw or heard, and his opportunities of perceiving what he asserts he did perceive. Even in what men think they actually

[31] See Shellabarger v. Nafus, 15 Kan. 547, 555.

[32] As said by Mr. Train: "The probative value of all honestly given testimony depends, naturally, upon the witness' original capacity to observe; second, upon the extent to which his memory may have played him false; and third, upon how far he really means exactly what he says. This is just as true of testimony in cases of so-called circumstantial evidence as in case where the evidence is direct, for the circumstances themselves must be testified to by witnesses who have observed them, and the authoritativeness of everything these witnesses have to say must lie in their ability to see, and describe accurately what they have seen." The Prisoner at the Bar, 224.

see or hear there is blended much of inference. Whether Berkely is right to the full extent to which he presses his doctrines or not, there can be no doubt that he is right in asserting that matters often asserted to be known to us through the medium of the physical senses are only known to us by inference.[33] A man's experience, his hopes, desires and fears mingle in almost every perception that enters his mind. Men of different minds see things with very different eyes. Very few transactions, indeed, are seen in all their parts by witnesses to be precisely alike.[34] If a man desires a thing to occur in a given way there is at work an influence which will go far toward making it seem to him as he desires it should be. Men who expect things to happen are deceived by things very slightly resembling the things they expect.[35] Few, indeed, are the perceptions which enter the human mind entirely uncolored by the motives and the experience of the individual mind that receives them. It is, therefore, not surprising that men so often err in respect to what they think they have seen and heard. These hints (for we have kept on the outermost boundaries of a great field) will serve to prove that even honest men's assertions as to what they saw or heard are not always to be accepted without investigation. It is, therefore, expedient to so examine as to discover the mental condition of the

[33] Modern Philosophy, Bowen, 142, 144; Illusions, James Sully, 21.

[34] See Münsterberg's On the Witness Stand, chapters on Illusions, Memory and Suggestions in Court. Many interesting experiments to test the observation and memory, most of them made in the class room, are there described, and it is shown that the observers differed very materially in what they observed and remembered.

[35] Carpenter's Mental Physiology, 283; Illusions, James Sully, 30. So, in The Prisoner at the Bar, 230, Mr. Train says: "The witness remembers in a large proportion of cases what he wants to remember, or believes occurred. The liar with his prepared lie is far less dangerous than the honest but mistaken witness, or the witness who draws inadvertently upon his imagination. Most juries instinctively know a liar when they see and hear one, but few of them can determine in the case of an honestly intentioned witness, how much of his evidence should be discarded as unreliable, and how much accepted as true." And a federal judge observes: "Men are prone to see what they want to see." Ideal Stopper Co. v. Crown Cork &c. Co., 113 Fed. 244, 255.

witness at the time of the occurrence of which he speaks, whether he was at the place for a specific purpose, what he expected or what he desired, how he was engaged, what his attention was fixed upon, and for what reason it was so fixed. These, and like matters, may enable the cross-examiner to bring before the jury considerations that will enable him to explain away much of the testimony of a witness, and sometimes to virtually destroy the entire testimony.

It is hardly necessary to say that an investigation into the time, place and situation of the witness is of importance, since from these things it is to be determined whether or not he had an opportunity to accurately perceive what he asserts he did perceive. If it is resolved to make an actual cross-examination for the purpose of ascertaining whether the witness did have an opportunity to acquire the knowledge he professes to assert, then, as a general rule, the examination should be very close and searching, probing into details, and often dissecting them into minute parts. It is manifest that the object must not be disclosed to the witness, since very few persons, if, indeed, any, are willing to acknowledge that they had no opportunity to observe what they affirm they did observe.[86] For this reason, it is better to keep from the main point for a time, and to occasionally break from the line by turning to other topics.

Human memory is treacherous. Few things remain in it with-

[86] We quote again from Mr. Train: "Witnesses are often honestly mistaken, however, as to their own ability to observe facts, and will unhesitatingly testify that they could hear sounds and discern objects at extraordinary distances. Lawyers frequently attempt to induce aged or infirm witnesses to testify that they could hear plainly what was said by the defendant, in an ordinary tone, at a distance, say, of forty feet. The lawyer speaks in loud and distinct tones during the preliminary examination, and then gradually drops his voice to that usually employed in speaking, in the hope that the witness will ask him to repeat the question. This ruse usually fails by reason of the fact that the lawyer, in his anxiety to show that the witness could not possibly hear the distance claimed, lowers his voice to such an extent that the test is obviously unfair." The Prisoner at the Bar, 226. But it is sometimes successful. See Joseph H. Choate's cross-examination of Mr. Sage, as given in Wellman's Art of Cross-Examination, 381.

out receiving color from existing impressions or experiences, and from other remembered things. No man's memory is an empty receptacle; it contains many things, and all things that enter it take color, and, indeed, often take form, from the things already there. What memory receives it appropriates; but, generally, the appropriation merges and mingles the new things with the old. A French thinker says: "Men have seen a very simple fact; gradually, when it is distant, in thinking of it, they interpret it, amplify it, provide it with details, and these imaginary details become incorporated with the details, and seem themselves to be recollections." What has long remained in memory seldom fails to become a piece of patchwork, for, as Mr. Sully says: "When the images of memory become dim, our present imagination helps to restore them, putting a new patch into the old garment. If there is only some relic of a part even preserved, a bare suggestion of the way in which it may have happened will often suffice to produce the conviction that it actually did happen in this way."[87] The partition between memory and imagination is most often a very frail one, and in the minds of even the most honest men is easily broken down. There are very many recorded instances where men have asserted that they remembered events that it was impossible for them to have witnessed.[88]

Where the witness is believed to be an honest one, and to have unintentionally suffered matters of past knowledge or of experience to become blended with the matter of which he testifies, the object of the cross-examiner should be to effect a separation. This can not, as a general rule, be effected by directly calling the attention of the witness to the confusion of these matters, but by a gradual series of questions, leading him to state facts from which it may be inferred that the confusion of past or imagined things with that which he professes to have seen or heard has led him into error. Sometimes a candid witness, free

[87] Illusions, 267.

[88] Ram on Facts, 68. See observations of Sir John Romilly, 16 Beavan 185, and in 23 Beavan 70.

from bias or prejudice, can be induced to acknowledge his mistake, or to confess that he can not separate one thing from another. A striking illustration of this is afforded by the case of the witnesses in a trial in Scotland, who were unable to separate what they had read in a newspaper from what they had heard from the parties.[89] It is seldom, however, that more can be done than bring the causes of error into view, so as to make them a subject for effective comment in the argument to the jury.

In other cases important facts are forgotten. These forgotten facts may often be recovered by arousing a train of thought that calls up the things associated in it. A forgotten transaction has been recalled by the sight of a letter, a receipt or a deed.

In cross-examining such a witness the principal object is to recall to his mind some event, occurrence or thing that will bring in its train the forgotten fact. If this can not be accomplished, then it is expedient to strip the remembered facts of all support from associated things, and cause them to stand out as detached, dislocated facts, without connection or relation with supporting facts. This course will, at least, supply fair reason for insisting before the jury that the witness either does not remember what he testifies, or, if he does, that there are other things he must necessarily have forgotten. In cases where oral conversations are testified to, this course is especially expedient, for it is not often that a witness can give the beginning and ending of a conversation. Most witnesses give parts only of a conversation, and a skillful cross-examiner may often secure such answers as show words forgotten, or words neither clearly heard nor accurately repeated.

Mistakes in identifying persons and things are of common occurrence. These mistakes have cost human lives, and have been the cause of much suffering, for even in cases involving the highest interest men and women have been deceived, and have deceived others, as to the identity of persons. The books contain many cases of mistakes of this character, made by witnesses of

[89] Ram on Facts, 61; Cockburn's Memoirs of His Time, 335. See also, Münsterberg's On the Witness Stand, 197.

adequate capacity, honest purpose and undoubted veracity.[40] Courts have been vexed and neighborhoods divided into bitter factions upon questions as to the identity of a hog, a cow or a horse. On few questions will men swear with more positiveness than on questions of identity and yet no subject is more fruitful of error.

A cross-examiner can not discharge his duty properly in such cases unless he has some knowledge of the sources of error. One source of error in such cases is that a man who is informed that he is to be called as a witness, expects to see what the party who compliments him by calling him claims he will see. There is, therefore, the expectant attention of which Dr. Carpenter speaks, and a thing or person resembling the person or thing the witness expects to see is quickly assumed to be that person or thing. Every one must have observed in his own experience that if he is expecting to see a person at a given time and place it is very easy to be mistaken. There is, in all such cases, an existing image in the mind, and with this image the person or thing to be identified is compared, and the preconceived desire that they shall be alike really makes them seem so.[41] There are cases, of course, where the peculiar marks are such as to make the identification easy and certain, and in such cases there should be no cross-examination at all, or, if there must be one, it should not give prominence to these marks. Where, however, there are no marks of a peculiar character, and there is reason to believe the witness is mistaken, a rigid actual cross-examination is expedient. But such an examination must not lead to a repetition of the general identification, for that would be a gross blunder. It should get at the preconceived belief of the witness, and draw from him, one at a time, his reasons for his present belief; but, in doing this, the questions must move quickly from one part of the subject to another, thus breaking the continuity of thought, and not allowing the witness time to frame an hypothesis which shall support, or seem to support, his belief. In no event must

[40] Ram on Facts, 87, 400.

[41] A very instructive discussion of this subject will be found in Mr. Sully's work on Illusions, 267, 268.

any fact be called out that will give support to the belief, nor must there be any question calling upon the witness to declare the degree of positiveness with which he speaks. This is the better general rule, but it is by no means without exception, and one of the notable exceptions is where it clearly appears that the cross-examination has shaken the confidence of the witness in his belief.

No actual cross-examination, whether for the purpose of detecting falsehood, exposing mistake, or separating fact from inference, can certainly be successful unless the examiner has settled in his own mind the hypothesis upon which he will proceed. During the direct examination this hypothesis should be constructed (if it has not been done before), and should be taken as the standard by which to judge the accuracy of the witness's testimony, and test the truth of his statements. To illustrate: Suppose the witness to testify that the defendant struck the plaintiff while he was stooping over and had his face from the defendant, and suppose that marks were found on the forehead of the plaintiff. In such a case (a very plain one, and chosen because it is plain) the cross-examiner would adopt as his hypothesis this: The marks of the blow show that it was dealt by some one in front of the plaintiff, and not by some one from behind, and his cross-examination, if he proceeded properly, would be directed to the development of this hypothesis, and, for this purpose, the posture of the parties, and the places they respectively occupied, would be brought out with the utmost distinctness. But, it may be said by way of caution, the witness should not be asked for an explanation. That should be left to be shown in argument to be impossible.

To take another supposed case for illustration: The witness testifies that the plaintiff, driving a wagon, stopped, looked and listened before reaching a railroad crossing, and yet was run over by an approaching train. In such a case, supposing the witness to be honest, the hypothesis should be: Although the plaintiff did stop, look and listen, he took the risk of crossing in front of the train. If this hypothesis be adopted, and the witness is honest and not mistaken, then the cross-examiner will endeavor

to bring out evidence supporting it, as, that the plaintiff made haste to cross the track, and whipping up his horses, drove on at great speed. Again, suppose a witness who is disposed to be fair, but is somewhat biased in favor of the plaintiff, to swear that he saw the plaintiff and the defendant walking together, that they were both very angry, that the defendant was shaking his fist at the plaintiff, that after they had gone some distance he heard a blow, and knew "the defendant had begun on the plaintiff." Now, assuming that the witness meant to tell the truth, that he was not mistaken as to what he actually saw, but, in fact, was mistaken as to who began the affray, the hypothesis will be that what he says as to the beginning of the affray is mere matter of inference, and the object of the cross-examination will be to support this hypothesis by ascertaining that he was so engaged that he did not actually observe what passed at that instant, or was in such a position that he could not have seen what he states as to the beginning of the affray.

Once more, suppose a witness, whose integrity is undoubted, to give an account of some occurrence, and to omit an important fact. In such a case the hypothesis would be that the omission is attributable to a lapse of memory, and the object of the cross-examination would be to arouse the memory to exertion, and enable it to recall the omitted fact. For this purpose, questions likely to arouse the memory by presenting facts closely associated with the omitted one would be asked, and so strongly enforced that the whole train must pass in memory. These illustrations will serve to show the value of a definite and settled hypothesis in every instance where there is an actual cross-examination. It is, no doubt, true that every effective and well-conducted cross-examination does proceed on some hypothesis, but in many instances there is no consciousness of having framed any hypothesis, for the process is a sort of instinctive one, arising from experience. The young advocate, however, who has had no experience, seldom constructs hypotheses, and it is for want of them that so many cross-examinations are unsuccessful.

"The object of a cross-examination," says Sergeant Ballantine, "is not to produce startling effects, but to elicit facts which

will support the theory intended to be put forward."[42] In a great measure this is true, but some qualification is needed. A qualification is needed, for the general rule undoubtedly is, that favorable answers are not to be expected from an adverse witness. This, at least, is the rule where no facts are known, or no indications are observed, which warrant the presumption that the witness will give favorable testimony. The fact that the witness is called by the adverse party, who, presumably, at least, knows in advance what his testimony will be, added to the further fact that witnesses, even without a direct motive, usually become partisans of the side that calls them, forbids the presumption that favorable answers may be elicited. This, however, is a rebuttable presumption, and will yield to countervailing facts. In general, the great purpose of a cross-examination is to break down the evidence in chief by showing error or falsehood, or by showing evil motives, or by toning it down to the least degree of harmful influence. The learned barrister from whom we have quoted is clearly right in asserting that the purpose is not "to produce startling effects." It certainly is no place for display, but is a place for real, serious business, both difficult and dangerous. It is, as the sergeant intimates, bad policy to ask many questions, unless there is some valid reason for asking them. There is no diversity of opinion on this subject, for it is quite well agreed that, in general, the fewer questions the better.[43]

Where the truth is spoken by the witness, many questions, instead of obscuring it, generally bring it out in stronger proportions and into a clearer light. Truth is incorrigible. Falsehood is, to borrow something of thought and expression from Edmund Burke, seldom consistent. Even in the case of an untruthful witness it is, however, unsafe to dwell on a point where the witness is at fault, since that course will afford him an opportunity to shuffle out of his uncomfortable predicament. Lord Abinger's axiom, which Mr. Taylor says he was fond of repeating to his

[42] Sergeant Ballantine's Experiences, 106.

[43] Ibid, 106; Ram on Facts, 147; Hints on Advocacy (8th ed.), 152; 2 Best on Evidence (Morgan's ed.), 659.

juniors, was, "Never drive out two tacks by trying to drive in a nail."

An evil arising from many questions is that of enabling the witness to supply omissions which he may have made in his examination in chief. Omissions are sometimes left by a cunning examiner in chief for the very purpose of having them supplied by the cross-examination, since they there appear with much greater force. So, too, as has been suggested in another form, a multitude of questions is quite likely to give the witness an opportunity to strongly impress the jury by repeating material statements. Once more, another evil arising from many questions is that of drawing out new matter, and so permitting it to be emphasized and paraded on the re-examination. It may, therefore, be taken as the better practice, as a general rule, to ask few questions in these cases: Where there is danger of supplying an omission, where there is danger of the witness shuffling out of an inconsistency, and where there is danger of strengthening the statements by repetition. The rule, however, we say, at the expense of repeating what has been expressed in various forms, is a mere general one, and will always yield to the peculiar circumstances of the particular instance.

Expert witnesses may be divided into two classes, the professional and the non-professional. A farmer called to testify as to the proper method of curing hay may be fairly considered as a type of the non-professional class, and a physician called to testify as to the mental condition of a party may be justly taken as a type of the ordinary professional class. The professional may be roughly subdivided into two subordinate classes, the extreme and the moderate. A physician who does not proclaim himself a specialist in mental diseases may be taken as a type of the moderate class, while a physician who does proclaim himself an expert in such diseases may be taken as a type of the extreme class. A more radical type of the latter class, however, is a professional microscopist, or a specialist in handwriting.

It is safe, as a general rule, to assume that a professional expert witness is a partisan, willing and eager to serve the party

who requests his services.[44] Indeed, all experts, whether professional or non-professional, are very apt to zealously espouse the cause of the party by whom they are called. There are, to be sure, exceptions to the general rule, but they are not numerous enough to more than prove the rule. The wise cross-examiner will assume that all the experts called by his adversary are prepared to do him all the harm they can, and that they will avail themselves of every opportunity that is offered them to give his client's cause a thrust or a blow. A professional expert witness has been defined to be "a man who is paid a retainer to make a sworn argument."[45] Bitter as this definition is, it is not entirely inaccurate. Expert witnesses usually do, with swiftness and avidity, seize every opportunity offered them to put forth an argument in the form of an opinion, and such an argument is the more hurtful because of the guise it wears. As an argument and nothing more it would do little mischief, but as an apparent opinion it may do much. The statement of the danger to be apprehended suggests the course to be pursued. Do not give the witness an opportunity to formulate an argument and put it forth in the form of an opinion.

It is not by the artifices that sometimes confuse and deceive ordinary witnesses that the testimony of professional experts can be broken down, for they are almost always shrewd and cunning men, sometimes, indeed, learned and skillful ones, and they come prepared for a contest with the advocate upon cross-examination. A bungler will, in most cases, give the testimony of a professional expert ten times the weight it would have if the witness were dismissed without a single question. Better no cross-examination than one that intensifies the impression created by the testimony drawn out on the direct examination; and if the cross-examiner has not given the subject upon which the witness is called to testify close and determined study, he cannot hope to accomplish good, but may be quite sure of doing serious mischief. Nothing

[44] See Dashiell v. Griffith, 84 Md. 363, 35 Atl. 1094, 1095, quoting from The Tracy Peerage, 10 Cl. & F. 154, 190; Roberts v. New York &c. R. Co., 128 N. Y. 455, 474, 28 N. E. 486.

[45] Am. Law Reg., iii.

is more mischievous than a cross-examination of an adroit expert witness by an examiner ignorant of the subject to which the testimony is addressed.

A successful method of cross-examining professional experts is to quietly and gradually lead them to an extreme position which can neither be fortified nor defended. If this course is resolved upon, the progress must be slow and the purpose carefully con cealed. It is often expedient to now and then wander from the direct path, and create a belief that the road the witness is to be taken over is a very different one from that which the examiner has resolved he shall travel. The examiner must not, however, for an instant, lose his temper, nor suffer his attention to be drawn from the line he means to take. When the position is reached, then, if the witness attempts to retreat or explain, it is well enough that the examiner's manner should become severe and determined, and the witness sternly kept to the questions asked him. An expert, when he finds himself in an uncomfortable position, will resort to all sorts of artifices and shifts to turn the line of the examination, but turned it must not be. A keen eye kept upon the witness will often enable the examiner to detect his purpose and to check it. The same faculty which enables the swordsman to detect and guard against a feint of his adversary very often enables the advocate to discover and prevent the artifices of a witness.

Some witnesses who come upon the stand as experts are mere shams and pretenders. When the advocate is satisfied that he has to deal with a witness of that kind, his true course is to make known to the witness that he knows his real character, and to boldly assume that he is a mere pretender. Of course, the advocate cannot make this assumption in direct words, but he can quite as effectually make it by his manner and the form of his questions. When a pretender is made to understand that the advocate knows his true character the work is easy, for the advocate has the witness entirely at his mercy.

A professional witness frequently takes malicious pleasure in repeating opinions which he thinks especially unfavorable to the adverse party. The cardinal rule is not to give him an opportunity to repeat the opinion, unless it is one that can be effectually

overthrown or shown to lead to absurd results. If he repeats it when not asked for, the court should be called upon to rebuke him. In some cases, however, it is the better policy to give the witness full rein, and encourage him to betray his partisanship, for jurors are not slow to look with suspicion upon a witness who volunteers opinions and gives irresponsive answers. The clearer it can be made to appear that the answers are not responsive, or that they are volunteered, the sooner it will be that the jurors will condemn the witness.[46]

The cross-examination demands of opposing counsel constant vigilance. There are important reasons for this. Favorable testimony, well worth the noting, may be elicited; facts and circumstances confirmatory of matters developed by the examination in chief may be drawn out; matters requiring explanation on the re-examination may be stated; obscurities needing clearing up may be created, and new matter may be brought out which, although within the subject of the examination, may need further development. Points upon which it is necessaray to re-examine the witness to restore his own confidence, and to reinstate him in that of the jury, may require to be noted.

Vigilance is required to keep out improper questions, and secure fair treatment for the witness. The witness ought to feel that an observant eye and an attentive mind are nearby to give him the protection the law awards. The cross-examination must be kept to the subject-matter of the original examination, since to allow the cross-examiner to introduce new matter may give him the advantage of employing leading questions. Cunning practitioners are quick to avail themselves of the carelessness or ignorance of their adversaries, and while making the witness their own, lead him without restraint to what they desire to obtain.

Leading questions, within limits, and subject to well-known exceptions, are allowed on cross-examination, but when a witness is taken into a new subject he is no longer under cross-examination, but becomes the witness of the party who introduces the new

[46] A jury is not bound by expert evidence at variance with physical laws or common knowledge. Roberts v. Jones (Mo. App.), 137 S. W. 639.

subject. As to that subject, opposing counsel should stoutly combat the right to ask leading questions.

It is a common practice for some not over-scrupulous advocates to ask unfair questions. Even so great, and usually so fair, an advocate as Erskine was admonished to give the witness fair play.[47] Fair play every witness is entitled to, and fair play the counsel who calls him should see that he gets. It is no unusual thing to assume that the witness has made a statement that he did not make, and on this false assumption harass and confuse him. A witness, be it always remembered, is not generally self-possessed under the fire of a hot cross-examination, and may be bewildered by such an assumption made, as most often it is, with a dogmatic and determined air. Such assumptions counsel have no right to make.[48]

More unfair and more perplexing to the witness, as well as more difficult for the advocate to detect, are those insiduous questions in which the assumption is covertly made. It is no uncommon thing for cross-examiners to bewilder witnesses by questions which covertly assume a fact that dare not be openly assumed. Many a disputant with far better opportunities for deliberation and reflection has been hopelessly entangled by these unfair questions. The authors of the Port Royal Logic give this example: "In the same way, if, knowing the probity of a judge, any one should ask me if he sold justice still, I could not reply by simply saying 'no,' since the 'no' would signify that he did not sell it now, but would leave it to be inferred, at the same time,

[47] The following story is also told of Erskine: "Sir," said he slowly, to a defendant who had refused to pay for a coat on the ground that it did not fit him, "do I understand you to say that one arm of that coat was longer than the other?" "I swear it," replied the witness. "What," cried Erskine in a hurried manner, "do you pledge your oath that one arm was not *shorter* than the other?" "I do," was the answer given hastily.

In the case of Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679, 690, the judgment was reversed, and it was held, among other things, that Mr. Choate was permitted to go too far on cross-examination. It was certainly very effective with the jury.

[48] 3 Chitty's Gen. Pr., 900; 1 Starke's Ev. (10th Am. ed.), 197. See also, Haish v. Munday, 12 Bradw. (Ill.) 539, 545.

that I allowed that he had formerly sold it."[49] To this class belong such questions as: When did you cease to be the enemy of the plaintiff? When did you sell your interest in this claim? When did you retire from the conspiracy? When did you convert the horse?

This unfair method of examination sometimes takes the form of a question which in appearance is one question only, demanding simply a categorical answer, whereas, in reality, several questions are combined. This is an old fallacy, and ought to be so well known as to be readily exposed, but it does, nevertheless, yet do no little mischief. Many a witness has been sorely puzzled by being required to answer "yes" or "no" to a question which in form is single, but in fact is double. Thus, a witness is asked: "You hurt yourself by jumping off a train running forty miles an hour?" Or he is asked: "You paid the money to the plaintiff's agent?" Or, again, he is asked: "You were the plaintiff's partner in this venture?" If the one to whom are addressed questions so plainly double as these were cool and collected, doubtless he would not be misled; but few witnesses can be cool and collected while under cross-examination, and they are often betrayed into error.[50] A witness who has an advocate demanding of him, "answer yes, or no, sir," is not in a condition

[49] Port Royal Logic, 144.

[50] A somewhat similar ruse was successfully practiced by O'Connell, according to the anecdote, upon an untruthful witness. The question was as to the identity of a hat which the witness had sworn belonged to the prisoner, whose name was James. On cross-examination O'Connell asked the witness if he had carefully examined the hat, then taking it up and looking inside, O'Connell spelled aloud the word "James," and said: "Now, let me see, do you mean those letters were in the hat when *you* found it?" Witness: "I do." O'Connell: "Did you see them there?" Witness: "I did." O'Connell: "Are you sure this is the same hat?" Witness: "I am sure." Then O'Connell exhibited the hat to the tribunal, showing that there was no name in the hat. An anecdote relating to Samuel Warren, author of "Ten Thousand a Year," is even more in point, but is too long to insert here. It will be found in Bigelow's Bench and Bar. In substance, Warren asked the witness whether an instrument was sealed with red or black wax, when in fact it was not sealed with wax, but with a wafer.

to clearly perceive the unfairness of the question asked him. Nor are the questions ordinarily asked of witnesses so plainly double as these we have given by way of illustration, for many are so adroitly constructed as to deceive keen thinkers.[51] The remedy for this evil is that proposed by Aristotle: "Several questions," he says, "should be at once decomposed into their several parts. Only a single question admits of a single answer."

No objection should be made during cross-examination, unless it is upon an important question, and the counsel making it is very confident that he can maintain it. Unless they are clearly tenable, and plainly required, objections create the impression that the advocate perceives that his witness is in distress and needs assistance, and that he is endeavoring to convey it through the medium of the objections. It is in most cases regarded as a confession of weakness, since jurors are disposed to look upon such interruptions as intended to give the witness time to rally, or as meant to convey to him suggestions to assist him out of his difficulties. Many unscrupulous men do use the right to make objections for a dishonest purpose, but they seldom reap any benefit; on the contrary, it recoils upon them in the vast majority of cases with fatal effect.

[51] Uberweg's Logic, 267; Theory of Thought, 295; McCosh's Logic, 184. See as to judge asking questions and when it may be prejudicial error, People v. Bernstein (Ill.), 95 N. E. 50; State v. Driggers, 84 S. Car. 526, 66 S. E. 1042, 137 Am. St. 855

RULES OF LAW.

1. After a witness has been examined in chief he may be cross-examined by the opposing counsel. If he has simply been sworn and not examined by the party calling him he cannot, in most jurisdictions, be cross-examined; but the opposite party may make him his own witness.

3 Bouv. Inst., § 3221; 3 Chitty's Gen. Pr., 897; 1 Greenl. Ev., § 445; 2 Elliott on Ev., §§ 896, 897, citing the authorities on both sides of the question as to whether a witness when sworn but not examined can be cross-examined. See also, 2 Wig. Ev., §§ 1892, 1893.

2. The object of a cross-examination is to sift the evidence and try the credibility of the witness, and, as a general rule, the extent of his knowledge, means of knowledge, and memory of the facts testified to in chief, his motives, his interest in the matter, and other facts affecting his credibility, may be inquired into.

3 Bouv. Inst., § 3221; 1 Greenl. Ev., § 446; Stevens v. Beach, 12 Vt. 585, 36 Am. Dec. 359; Hyland v. Milner, 99 Ind. 308; 2 Elliott's Ev., §§ 894, 901, 908. A question directly tending to show that the real import of the testimony of the witness in chief is materially different from what it appears to be on the surface is within the range of legitimate cross-examination. Colloty v. Schuman, 73 N. J. L. 92, 62 Atl. 186.

3. In cross-examinations much more latitude is given than on an examination in chief, but a witness may not be cross-examined as to collateral and irrelevant matters merely for the purpose of afterward contradicting or impeaching him.

1 Greenl. Ev., § 449; Furst v. Second Avenue R. Co., 72 N. Y. 542; Lumley v. Torsiello, 69 App. Div. (N. Y.) 76, 74 N. Y. S. 567. See note to Blue v. Kibby, 15 Am. Dec. 96, 99; 1 Starkie's Ev., *134. See also, Rose v. First Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. 258, and note; Hitchcock v. Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. 474, and note. We do not mean, of course, that the credibility of the witness may not be tested, or the like, by what may in one sense be collateral questions. But collateral and irrelevant issues cannot be tried and a cross-examiner who attempts to do so is usually concluded by the answer of the witness. See also, Jones Ev. (2d ed.), § 827.

And a defendant, whose signature is in dispute, cannot, it is held, be compelled, on cross-examination, to write his name for the purpose of comparison. First Nat. Bank v. Robert, 41 Mich. 709. See also, Massey v. Bank, 104 Ill. 327; and *compare* Nat. Bank v. Armstrong, 66 Md. 113, 6 Atl. 584, 59 Am. 156.

4. Under the American rule, adopted in most of the states, matters not connected with or related in any way to the subject-matter of the examination in chief cannot be gone into on cross-examination.

Mitchell v. Welch, 17 Pa. St. 339, 55 Am. Dec. 557; Philadelphia &c. R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 461, 10 L. ed. 535; 2 Elliott

Ev., §§ 915, 927, where the subject is considered at length and the authorities on both sides are cited.

5. But cross-examination as to new matter may be allowable when it is a part of the *res gestæ*,[1] and it is not strictly confined to the specific matter of the examination in chief, but may extend to the general subject thereof.[2]

[1] Bank v. Fordyce, 9 Pa. St. 275, 49 Am. Dec. 561; Eames v. Kaiser, 142 U. S. 488, 35 L. ed. 1091, 12 Sup. Ct. 302; Glenn v. Gleason, 61 Iowa 28, 15 N. W. 659.

[2] Boyle v. State, 105 Ind. 469, 5 N. E. 203. See also, Mayer v. People, 83 N. Y. 364, 378; Patrick v. Crowe, 15 Colo. 543, 25 Pac. 985; Pickard v. Bryant, 92 Mich. 430, 52 N. W. 788; Little v. Lickhoff, 98 Ala. 321, 12 So. 429; People v. Dixon, 94 Cal. 255, 29 Pac. 504; Gilmer v. Higley, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. 471; Home Benefit Assn. v. Sargent, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. 332. There is considerable conflict or variation in the application of the rule, and there are decisions all the way between the two extremes, the English rule, adopted in a few states, apparently allowing cross-examination on any subject within the issues, and the rule in some states confining it strictly to the precise subject of the examination. The better rule seems to be between the two extremes, not holding the cross-examination to the particular phase of the general subject brought out in chief, and not, on the other hand, permitting the cross-examiner, ordinarily, to go into an entirely different subject without making the witness his own. For full consideration see 2 Elliott Ev., §§ 917-922, cited in Lambert v. Armentrout, 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556, 558.

The whole matter rests, however, largely in the discretion of the trial court. Wachstetter v. State, 99 Ind. 290; News Pub. Co. v. Butler, 95 Ga. 559, 22 S. E. 282; Neil v. Thorne, 88 N. Y. 270; Bailey v. Bailey, 94 Iowa 598, 63 N. W. 341; Miller v. Smith, 112 Mass. 470, 476, 1 Stark. Ev., *132. And the question as to how far the cross-examination may go is one of local law and not a federal question. Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. 22.

6. Leading questions may usually be asked upon cross-examination.

3 Bouv. Inst., § 3221; 1 Stark. Ev., *132, 133; 2 Elliott Ev., § 851; Moody v. Rowell, 17 Pick. (Mass.) 490.

7. The rule requiring a party, when objection is made to a question, to state what he expects to prove by the answer does not apply to cross-examination.

Harness v. State, 57 Ind. 1; Hyland v. Milner, 99 Ind. 308; City of Evansville v. Thacker, 2 Ind. App. 370, 28 N. E. 559; Cunningham v. Austin &c. R. Co., 88 Tex. 534, 31 S. W. 629.

8. A witness cannot be compelled to criminate himself, and questions calling for an answer that would tend to criminate him should not be asked.

3 Bouv. Inst., § 3213; 1 Greenl. Ev., § 451; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, and note, 153; notes in 75 Am. St. 318-347, and in 59 L. R. A. 465.

But the right to refuse to answer such questions is merely a personal privilege that the witness may waive. Fries v. Brugler, 7 Halsted (N. J.) 79, 21 Am. Dec. 52, and note, 55, 61; State v. Wentworth, 65 Me. 234, 20 Am. 688; 1 Greenl. Ev., § 460; 1 Stark. Ev., *172; Beauvoir Club v. State, 148 Ala. 643, 42 So. 1040, 121 Am. St. 82, 89, citing 2 Elliott Ev., § 1007. And it is held that if he does not waive his privilege and answers an irrelevant question, his answer is conclusive, and cannot be contradicted by the party who asked the question. Goddard v. Parr, 24 L. J. R. Ch. 784; United States v. Dickinson, 2 McLean (U. S.) 325; Shields v. Cunningham, 1 Blackf. (Ind.) 86; Whart. Ev., § 547.

9. Where the prosecution to which the witness might otherwise be exposed by his answer is barred by the statute of limitations, or the offense has been pardoned, the reason for the privilege thus having ceased, the privilege also ceases, and the witness may be compelled to answer.

Calhoun v. Thompson, 56 Ala. 166, 28 Am. 754; Parkhurst v. Lowten, 1 Meriv. 400; State v. Quarles, 13 Ark. 307; Weldon v. Burch, 12 Ill. 374; 2 Elliott Ev., § 1010. But see State v. Edwards, 2 Nott. & McC. (S. Car.) 13, 10 Am. Dec. 557.

CHAPTER IX.

THE RE-EXAMINATION OF WITNESSES.

"Discretion shall preserve thee, understanding shall keep thee."—*Proverbs.*

"A slight answer to an intricate and useless question is a fit cover to such a dish; a cabbage leaf is good enough to cover a pot of mushrooms."—*Jeremy Taylor.*

Practical Suggestions.

It is often said that the object of a re-examination is to afford the witness an opportunity to make explanations rendered necessary by his cross-examination, but this is a narrower view than the principles of advocacy warrant.[1] More can be accomplished by a skilful re-examination. Obscurities can be cleared away, and facts be brought into stronger light by questions that recall the mind of the witness to the facts to which he testified in his direct examination, and of which his knowledge is clear and distinct. This may be done in a suggestive method, yet without violating the rule forbidding leading questions, for the witness may have his attention directed to one fact which is clear in his mind, and gradually led from that fact to those on which he appears to have been confused. Care must be taken to begin upon matters regarding which the mind of the witness is not confused, and on these he should be detained long enough for the faculties of association and reflection to do their work. It is almost always dangerous to go at once to the point where the confusion exists. First settle one or two distinct ideas in the mind of the witness,

[1] For an illustration of the manner in which lawyers frequently cross-examine as to some particular point deemed material and the re-examination to explain and clear away obscurities, see the recent case of Oceanic S. S. Co. v. Simpson Lumber Co., 186 Fed. 764, 766-768.

clear all mists away from these, and he will grow stronger and clearer as he goes on. If the opposite course is pursued the chances are that the confusion will be deepened. If once the witness can be made to feel that he is on solid ground he will regain confidence, and not only explain what needs explanation, but he will also make clearer and stronger many parts of his previous testimony.

Not only must facts be selected of which the knowledge of the witness is clear and distinct, but they must be so arranged as to lead him out of his confusion. If the facts are judiciously selected and skilfully arranged, they will be to the bewildered witness as guide-posts are to the traveler who has lost his way. The arrangement which will most likely accomplish this purpose is that which corresponds with the order of time in which the events occurred. Make sure that the witness gets a clear view of the first fact, and is impressed with the knowledge that it is the first in order of time, and then deliberately proceed with the facts which follow in due order. It may sometimes be necessary to particularly direct the attention of the witness to the time, the place, and the actors in the event or transaction to which his testimony refers. The time, however, should be fixed by events or things rather than by dates. It is not discreet, as a general rule, to ask for the day of the week, month or year; it is better to ask for events, occurrences or things, for if these can be called into the mind of the witness his confusion will clear away. It is seldom safe to ask for dates, since, as we have said, they are not easily remembered, and to ask an already confused witness for what he cannot distinctly remember will be almost sure to make "confusion worse confounded."

"The business of a re-examination," says Mr. Cox, "is the restoration of your witness to the confidence of himself and of the jury." This, indeed, is an important part of the business of a re-examination, but it is not the whole of the business. A cross-examination sometimes so confuses an honest witness that his powers of memory and reflection seem almost paralyzed, and when this occurs the first thing to be done is to clear away the confusion and restore the power of these faculties. In this work

perfect composure must be maintained by the examiner, and he must proceed with calmness and deliberation. Here there is no hope for an angry man. The first questions asked must be such as it is certain the witness can readily and clearly answer. They must be on matters which are simple, and the form of the questions must be so clear that the witness can comprehend them without any mental exertion. Mr. Cox gives this excellent advice on this phase of the subject: "Soothe his irritation by your words and aspect. When he is restored to himself, take him quietly through his story. Bring out, as far as you can, the strong points of his testimony which have not been shaken on the cross-examination."

In many cases it will require close observation and clear judgment to determine whether it is safe to ask an explanation on points on which the testimony of the witness has been impaired. If there is great doubt whether a satisfactory explanation can be given, none should be asked. A failure to explain will intensify the injury done by the cross-examination. If in some doubt whether the witness can give a reasonable explanation, but with reason to hope that he can, it is expedient to gradually approach the subject, and by your questions set it in the plainest way before the witness. If his answers indicate that his mind is at work intelligently, and that his confidence has been regained, then it will be safe, as a general rule, to seek the explanation as directly as practicable. But, in every case where there is doubt, great or little, approach the subject cautiously, and do not get so entangled that you cannot safely retreat by going to some other topic. While in reality retreating, avoid the appearance of doing so.

If the witness is a corrupt one, and conclusively so shown on cross-examination, it is neither wise nor proper to attempt to rescue him. This is not to be understood as implying that a bad man is necessarily a corrupt witness. A man of bad reputation may tell the truth, and, as a general rule, will tell it, unless there is some motive for lying.[2] If it is apprehended that the reputation of the witness may be attacked, then the re-examination should secure as many circumstances tending to give probability

[2] See Gates v. Kelley, 15 N. Dak. 639, 110 N. W. 770, 773.

to his testimony as possible. Little things creeping out without apparent design do very much to fortify the testimony of such a witness. If the cross-examination discloses a purpose to impeach by contradiction, and that the attack will be formidable, then the re-examination should, as much as possible, draw off attention from the points upon which it is supposed the contradiction will be strongest. It is a mistake to magnify the points where contradiction is anticipated, except in cases where the attack will be weak, or the support of the witness very strong. If it can be made to appear that the contradiction is on a point of little importance, it will not be difficult to convince the jury in argument that contradictions on such points go a very little way toward proving a witness guilty of perjury. If the defense of a witness attacked can be made very strong, then magnify the point on which it is supposed he will be contradicted, since, if the witness makes a successful defense, his testimony will have greater force, because the jury naturally rejoice at the vindication of a witness unfairly or unjustly assailed.

An artifice of many cross-examiners is to examine up to a certain point in a transaction or conversation and then turn off abruptly to some other phase of the testimony, thus weakening the effect of the evidence by creating the impression that what was called out is all there is of the testimony on the particular subject. In such cases the course is clear. Bring out on re-examination the parts omitted on the cross-examination. When the artifice is detected and successfully exposed its author will have good cause to repent of its employment; but the difficulty is in detecting and exposing it, for the process is often conducted with such adroitness that it can only be detected by the keenest observer. A dull or careless one will seldom notice it. The advocate adroit enough to make the artifice successful will not fail to make effective use of it in argument.

Favorable facts in the shape of new matter are very often developed on cross-examination, and the advocate who fails to make good use of them on the re-examination has either slept at his post or is not well fitted for his duty. In some cases the facts are so fully brought out on the cross-examination as to be plain

enough without assistance from the counsel conducting the re-examination, and when this is so it is the better policy to leave them untouched until the time comes for making them available in the argument to the jury. In other cases it may be unsafe to follow the cross-examiner into this new matter, since he may have left it unfinished for the very purpose of enticing the re-examiner into an uncomfortable situation. Here, as well as everywhere, he is the wise man who lets well enough alone. It may be observed, lest there be misconception, that a new subject cannot legitimately be brought out on cross-examination except where it concerns motives, or in some way is proper for the purposes of impeachment, but new matter growing out of the subject of the examination in chief may often be brought out on the cross-examination.

As a general rule it is not good policy to re-examine for the purpose of explaining unimportant discrepancies, since they seldom do harm. There is sometimes real harm done by a re-examination on such matters, for a witness is frequently bewildered by a discovery that there is some discrepancy which friendly counsel deem so important as to demand an explanation, and, as his confusion increases, he goes from bad to worse. So, too, a re-examination on such points magnifies their importance, and gives them far greater weight than they would otherwise possess.

A mishap that not infrequently befalls an inexperienced or careless re-examiner is that of eliciting new matter on re-examination, and thus affording the opposing counsel an opportunity of re-cross-examining.[8] This is always injurious, and sometimes fatal. A skilful cross-examiner will seldom fail to greatly impair, if not entirely destroy, the whole testimony. This he will do by covering up important points in the previous testimony, or by bringing out contradictions and inconsistencies. The advocate who does his duty well will bring out all of the facts in the direct examination, and in the re-examination keep so closely to the cross-examination as to shut off all pretense of a right to re-cross-

[8] Wood v. McGuire, 17 Ga. 303, 318; Commonwealth v. Nickerson, 5 Allen (Mass.) 518.

examine. There is, as is well known, no right to introduce new matter on a re-examination, but the wary advocate will not always avail himself of the rule on this subject, preferring in many cases —not always, however—to let the new matter in, and claim the right to re-cross-examine. An examiner who fails to observe the rule, never ask a question without a purpose, is very apt to encounter the mishap of which we are here speaking, and he will be wise if he asks no question for which he cannot assign a sensible reason. This rule will, in many instances, cut off the re-examination entirely, but it is, nevertheless, by far the safest rule that can be followed. It is, indeed, a grave mistake to presume that there must be a re-examination in every instance.

Never make an objection without being able to give a strong reason for it, is a good general rule everywhere, but is especially valuable when applied to a re-examination. Not only does an objection at such a juncture strengthen the impression created by the testimony, and engender a suspicion, if not a belief, that testimony is being kept out on technical grounds, but it sometimes gives the re-examiner a coveted excuse to abandon a re-examination which he is glad enough to retreat from if only he can do so without a plain surrender. Questions are frequently asked for the very purpose of calling out an objection, and thus securing a covering for a retreat which can only be safely made under cover. But, although objections should be sparingly made, they are sometimes very essential, and when essential, they should be made with earnestness, and supported with reasons which, if not convincing, shall, at least, be not destitute of plausibility.

The advocate against whom such objections are urged needs to be vigilant lest advantage be taken to covertly insinuate some matter intended to influence the jury. Reprehensible as the practice is, many cunning advocates make use of objections ostensibly intended for the court as a vehicle of communication with the jury. Sly blows, not always ineffective because foul, are thus dealt, and he who would parry them must ever be on the alert. Men, in the excitement of a hot contest waged in open court and in the presence of many on-lookers, are often impelled to do what in cooler moments they would be ashamed to attempt; others,

less scrupulous, care not how a cause is gained so that it is won, and it is, therefore, always a safe general rule to presume that an adversary will bear watching. An observer of judicial contests, we are sorry to say, is likely to conclude that the rule is as nearly universal as any rule involving human conduct can be. A coarse name, familiar in legal terminology, applies to many advocates who, when not in the thick of the fight, may compare favorably with the most blameless men of any business or professional life. At all events, never let down your guard until the jury leave the box.

RULES OF LAW.

1. The re-direct examination should not introduce new matter, but the trial court is invested with a wide discretion, and may permit the introduction of such matter.

Beal v. Nichols, 2 Gray (Mass.) 262; The Queen's Case, 2 Brod. & B. 207. See also Morehouse v. Morehouse, 70 Conn. 420, 39 Atl. 516; Washington Ins. Co. v. Bradley, 171 Ill. 255, 49 N. E. 519; Hemmens v. Bentley, 32 Mich. 89.

2. The proper course where new matter is sought to be introduced is to ask permission, and not to demand the privilege as a matter of right.

Scharer v. State, 36 Wis. 429.

3. Where new matter is drawn out on cross-examination, or a new phase developed, the re-direct examination may, as a matter of right, cover that matter. In strictness, the examination where new matter is brought out is a cross-examination.

Basshan v. State, 36 Tex. 45; Goodman v. Kennedy, 10 Neb. 270. See also Commonwealth v. Dill, 156 Mass. 226, 30 N. E. 1016; Merritt v. Campbell, 79 N. Y. 625.

4. If part of a matter is brought out on cross-examination, the whole matter, if relevant, and not collateral, may be gone over on the re-direct examination.

Roberts v. Roberts, 85 N. Car. 9; McCracken v. West, 17 Ohio St. 16;

Somerville &c. Co. v. Doughty, 2 Zab. (N. J.) 495; Commonwealth v. Armstrong, 158 Mass. 78, 32 N. E. 1032; 2 Elliott Ev., § 930.

5. Explanations of relevant matter may be elicited.

Commonwealth v. Wilson, 1 Gray (Mass.) 337; Campbell v. State, 23 Ala. 44; United States v. Barrels of High Wines, 8 Blatch. (U. S.) 475; People v. Hanifan, 98 Mich. 32, 56 N. W. 1048; Walker v. State, 136 Ind. 663, 36 N. E. 356.

6. Corrections of mistakes may be secured by the re-direct examination, and obscurities removed.

Gilbert v. Sage, 5 Lans. (N. Y.) 287. See also, Loy v. Petty, 3 Ind. App. 241, 29 N. E. 788; People v. Mills, 94 Mich. 630, 54 N. W. 488; Merrell v. State (Tex. Cr. App.), 70 S. W. 979; 2 Elliott Ev., § 934;

7. It is not an abuse of the discretion invested in the trial court to permit a witness to be recalled for re-examination.

State v. Rorabacher, 19 Iowa 154; Walker v. Walker, 14 Ga. 242; People v. McNamara, 94 Cal. 509, 29 Pac. 953; Springfield v. Dalby, 139 Ill. 34, 29 N. E. 860.

8. A witness will not, ordinarily, be allowed to be recalled merely for the purpose of restating his testimony, but there may be cases where this course is proper.

Bigelow v. Young, 30 Ga. 121; Gray v. Murray, 4 Johns. (N. Y.) 412; Bissell v. Russell, 23 Hun (N. Y.) 659; Dunn v. Pipes, 20 La. Ann. 276; Kingston v. Tappan, 1 Johns. Ch. (N. Y.) 368. See also, Pigg v. State, 145 Ind. 560, 43 N. E. 309; 2 Elliott Ev., § 936.

CHAPTER X.

THE ADDRESS TO THE JURY.

"The argumentative part of a discourse is its living soul. It is to true eloquence what charity is to true Christianity."—*John Quincy Adams.*

"In your arguments at the bar, let argument predominate."—*William Wirt.*

"But at the bar, conviction is the great object."—*Hugh Blair.*

"Sometimes mere emotion impresses, but it soon wearies. Superiority of ideas always commands attention and respect."—*Theodore Parker.*

"A great speech is a very fine thing, but, after all, the verdict is the thing."—*Daniel O'Connell.*

Practical Suggestions.

A great argument is the argument that carries the jury. It is for the purpose of securing the verdict, and only for that purpose, that the sensible advocate speaks at all. The argument is the means, not the end. The argument is but an instrument used to bring about a desired result. It is no more an end than is the chisel of the sculptor or the brush of the painter. It is not for the purpose of affording an advocate a field for displaying his learning or his rhetoric that his client employs him, but for the purpose of convincing or persuading the jury that the law and the evidence, or that justice and right, entitle him to their verdict.[1] All honorable things that tend to secure this result it is the duty of the

[1] "Clearness, force and earnestness are the qualities which produce conviction," is a statement made by Daniel Webster and quoted with hearty approval by Sir Charles Russell, whose speeches to juries were almost invariably simple, clear, straightforward statements driven home, as his biographer says, "with the hammer of Thor." O'Brien's Life of Lord Russell, 102.

advocate to do, and to do them without seeking fame for himself, except, indeed, such as comes to the successful verdict-getter. To be sure, learning and eloquence may often be brought into the work, but they should be brought into it because they will benefit the client's cause, and not merely because they will secure the advocate praise and applause. They are called to aid the cause, not merely to benefit the advocate.

The argument must be adapted to the case, and framed with the single purpose of securing the verdict of the jury in that particular case. Whatever will conduce to this end should be done, and whatever will not aid in attaining it should be sternly put aside. The one great purpose should determine the frame of the argument, no matter how strong the temptation to wander into collateral matters affording opportunity for the display of rhetorical and declamatory powers. We do not speak of eloquence, because we believe there is no such thing as genuine eloquence where the speaker's words do not tend to convince or persuade in the particular case in which he speaks; for, no matter how beautiful his imagery or well rounded his periods, his eloquence is spurious, resembling the genuine only as the counterfeiter's most skilful work resembles the treasury note that bears the government's warrant of value. To be eloquent, the diction and structure of the speech must be suited to the occasion.[2] With quite as much propriety might one engage in the work of hedging and ditching in full court costume as for an advocate to dress an argument in an ordinary commercial or property controversy in sonorous sentences adorned with tropes and figures. But there are causes which demand the highest efforts of oratorical power. There are cases which call for all the graces and forces of oratory, and in such cases no bounds need be set to the speech, save that declamation should not be mistaken for argument, nor words for thoughts, nor noise for power.

[2] Cicero, Oratory and Orators, B. II, Chap. LI. "True eloquence," says Webster, "must exist in the man, in the subject, and in the occasion." So, as said by La Rouchefoucald, there is often "as much eloquence in the tone of voice, in the eyes, and in the air of a speaker, as in his choice of words."

The wise advocate will yield to the dominant purpose for which he is to speak, and in thinking out the line of his discourse will strive to so construct arguments and so present facts that the jury will be convinced or persuaded that his cause is just; he will sink all considerations of self-benefit in the determined resolution to speak for his cause and for that alone. If his resolution be firmly made and determinedly adhered to, his words, illustrations and examples will fit his cause, provided, always, that he be not a blunderer or a man ignorant of human nature. Both in the resolution and in the execution of it, he must be thoroughly and unyieldingly in earnest. Earnestness and determination are sources of power, and it is power, not beauty or grace—though beauty and grace are the allies, not the enemies, of real power—that influences the minds of jurors. What contributes to power contributes to success; what detracts from power, though it add beauty and grace, detracts from the influence of a forensic discourse. If once the resolution to speak only for the sake of the client's cause gains supremacy, then the discourse will accomplish its purpose, if that be possible, provided, always, that the advocate knows every part of his case and rightly judges the nature and habits of thought of the men he hopes to influence. This resolution will give to him an earnestness that will impel him to do what is natural, and naturalness ever gives force to an argument upon questions of fact.

The graces and beauty of diction are by no means unimportant; but what would be beautiful in one case may be a positive deformity in another. The diction should always be chaste and elegant, never low and course. Above all things, avoid flippancy. Nothing so much detracts from power as a flippant, careless manner. Jurors expect, and they have a right to expect, that a cause which calls them into the box shall be treated with seriousness and earnestness by the advocate who asks their attention. Flippancy in fugitive newspaper articles may not be so bad, but in forensic contests it is abominable.

Men are pleased by expressive and beautiful language. Unlearned men read Burns with pleasure and Shakespeare with delight. Learned and unlearned men read dry, bald writers, like

Bishop Butler, with reluctance, though they appreciate the force of the logic. Dry, dull speakers, at the bar and in the pulpit, put men to sleep, and a sleepy mortal was never yet convinced or persuaded. If the discourse sparkles with bright thoughts and striking words, the mind of the juror is opened to conviction. Xenophon truly said, "It is easiest to convince those whom we please," and this is true of jurors. But no juror finds pleasure in a stilted style unfitted to the subject under discussion. Men like harmony and consistency, and they are quick to perceive and resent an offense against good taste. Commonplaces and worn-out quotations give them no pleasure, low sayings disgust them, and a stilted, unnatural style finds no favor in their sight. A stilted style, ill-befitting the subject of dispute, seems manufactured for display, not for real business, and jurors believe that they are in the box for business purposes. Ornament and embellishment are not to be disdained,[8] but they must be suited to the subject and to the body of the discourse. A profusion of highly-wrought figures would be as ill-suited to a controversy about the ownership of a horse or a town lot as the columns of the temple of Jupiter to a pioneer's log cabin. But illustrations, examples and figures of speech adapted to the subject of the discourse are efficient instruments of power. These, however, should seem to arise naturally from the subject, and not appear to be introduced for mere display. The ornaments should appear to be made for the discourse, not the discourse for the ornaments. Dr. Hall said: "If I were upon trial for my life, and my advocate should amuse the jury with tropes and figures, burying his argument beneath a profusion of tropes and figures, I would say to him, 'Tut, man; you care more for your vanity than for my hanging. Put yourself in my place; speak in view of the gallows, and you will tell your story plainly and earnestly.' I have no objections to a lady's winding a sword with ribbons and studding it with roses when she presents it to her lover, but in the day of battle he will tear away the ornaments and present the naked edge to the enemy." Certainly, no wise advocate will bury his arguments beneath

[8] "Eloquence, as the art of persuasion, is not extinguished, but simply modified in form." 37 Albany Law Journal, 426.

tropes and figures, but he will use tropes and figures to arouse emotions of pleasure in the minds of the jury, and to dispose them to a favorable reception of his arguments; and so, too, he will use them to illustrate and enforce his arguments. Erskine, Webster, Choate, Prentiss and Spencer richly adorned their forensic speeches, and yet no one can doubt their real power. A speech barren of ornament seldom moves a jury, for men are influenced by the beautiful and sublime. Poetry finds its ways to the minds of men, and lingers there because of its beauties, and not because of its arguments or its utility.[4]

Advocates are often induced, by the fear of "shooting over the heads of the jury," to adopt what is called a plain style, and to rigorously exclude all ornaments and embellishments. In this they err. Men unlettered and unlearned read translations of Homer with pleasure, and understand him without difficulty, and so they do the sublime poetry of the line of Hebrew prophecy that "culminated in wrapt Isaiah's wild prophetic fire." A dry and barren style pleases them as little as it does the man of letters. To be sure, they want thoughts as well as words, but the brighter the words and the more beautiful the imagery in which the thoughts are apparelled the better are they pleased. Thought may be too deep for the comprehension of the ordinary juror, or the language and method so confused that they cannot follow the speaker. The diction, however, cannot be too elegant nor too highly adorned, although if it offends against good taste, or conceals the argument, it will do harm; but the harm will come from another cause than that of shooting over the heads of the jurors. Archbishop Whately thus philosophically discusses this subject: "The vulgar require a perspicuous, but by no means a dry and unadorned style; on the contrary, they have a taste rather for the over-florid, tawdry and bombastic; nor are the ornaments of style by any means necessarily inconsistent with perspicuity; indeed, metaphor, which is among the principal of them, is, in

[4] "The business of oratory," wrote Lord Chesterfield, "is to persuade people, and to please people is a great step to persuading them." "Without eloquence," says another, "one is not a poet; without poetry one is not an orator." Thoughts of a Parish Priest, 45.

many cases, the clearest mode of expression that can be adopted, it being much easier for uncultivated minds to comprehend a similitude or analogy than an abstract term."[5] Even to the best trained mind a simile or a comparison will ordinarily carry a clearer and deeper meaning than a mere general term, and we find judges as well as advocates, philosophers as well as poets, frequently invoking their aid. But ornamentation that seems the work of studied effort, and wrought for its own sake and that of its author, enfeebles the discourse, for it hides the cause and exhibits the speaker. It is the cause, and not the speaker, that should be kept before the minds of the jury. An able reviewer of Curran says: "The reason and judgment reject the unsubstantial and airy creations of an unfettered imagination. They demand that chaste though not unadorned diction in which the cause itself may be said to speak, and the speaker is comparatively silent."[6]

The advocate who makes his cause speak is the one who secures the verdict. If he can make it appear that it is the cause which deserves the favor of the jury, he does all that the most consummate master of the art of advocacy can do. "I tell you that which you yourselves do know; show you sweet Cæsar's wounds, poor, poor dumb mouths, and bid them speak for me."[7] Jurors are seldom willing to own that it is the speech that convinces them, and if the speaker obtrudes himself upon their attention to the exclusion of his cause, it will almost certainly bring him defeat, for the chances are that the jurors will infer that it is the art of the advocate, and not the right of the cause, to which they are expected to yield. This they are quite sure to resent as an arrogant claim of superiority, and as a reflection upon their intelligence

[5] Whately's Rhetoric, Part 3, Chap. I, § 2; Logic, Book 3, § 5.

"I know," says Judge Cullen, "that it has been said by a distinguished judge that 'illustration is not argument,' but at times it is at least a very convenient substitute for it." Skinner v. Norman, 165 N. Y. 565, 59 N. E. 309, 310.

[6] Monthly Review, Vol. 90, p. 337.

[7] Mark Antony's oration over the body of Cæsar in Shakespeare's "Julius Cæsar" is one of the most adroit and most eloquent of all orations in this as well as in other respects.

and their independence of judgment. For this reason, if for no other, all appearance of speaking for the sake of gaining applause for the speech and the speaker should be avoided, and it is, therefore, well to guard against excessive ornamentation, since it is very apt to give the discourse that appearance.

Advocates get verdicts because they make it seem that they are in the right. Jurors give their verdicts to a speaker not because they think he has made a great speech, but because he convinces or persuades them that the law and the evidence are with him. In general, it is the advocate who is beaten to whom they yield superiority in speaking, and this may be accepted as proof that the really great advocate is the one to whom they give their verdict, but from whom they withhold their praise.

Professor Matthews relates an anecdote of Rufus Choate which is strikingly illustrative of the principle we are endeavoring to establish: "We were once," writes the professor, "talking with an intelligent old gentleman in Massachusetts, a hard-headed bank president, who had served as foreman on a jury in a law case, about the ability of Rufus Choate. 'Mr. Choate,' said he, 'was one of the counsel in the case, and, knowing his skill in making white appear black and black appear white, I made up my mind at the outset that he should not fool me. He tried all his arts, but it was of no use. I just decided according to the law and the evidence.' 'Of course, you gave your verdict against Mr. Choate's client?' 'Why, no, we gave a verdict for his client; but then we couldn't help it—he had the law and the evidence on his side.' "[8]

Of Lord Abinger this anecdote is told: A juror who had given him many verdicts, on being asked what he thought of the different leaders, said: "Well, that lawyer Brougham be a wonderful man; he can talk, he can; but I don't think nout of Lawyer Scarlett." "Indeed," replied his interrogator, "you surprise me. Why, you have been giving him all the verdicts." "Oh, there's nothing in that," said the juror; "he be so lucky, you see; he's

[8] Oratory and Orators, 210. The author also gives a somewhat similar anecdote of Chief Justice Parsons, of Massachusetts. And see Senator Hoar's "Autobiography of Seventy Years."

always on the right side." David Paul Brown, describing a great verdict-getter, says: "In addressing a jury he seemed rather to argue his case with them than to them, and, in the language of one of his competitors, 'he virtually got into the jury-box and took part, as it were, in the decision of his own case."[9] The Duke of Wellington said of Lord Abinger, that when he pleaded a cause there were thirteen jurymen. Very like the anecdotes related of these great advocates, is that told of Macaulay. His biographer represents an Edinburgh artisan as thus commenting upon one of his speeches at the hustings: "Ou! it was a wise-like speech, and no that defeeshunt in argument; but, eh! mon"—with a pause of intense disappointment—"I am a thinkin' I could a said the hail o' it mysel'."

The faculty of so presenting a case that it shall seem to the jurors that they could themselves have so presented it, is the great secret of success in jury trials. When this is done, the jurors feel that the strength of the case is so great that the skill of the advocate has no power over their minds, but that they are influenced solely by the right of the case. When a man who knows himself to be no orator feels that he could have presented the case as well as the advocate has done, he is convinced that the case is a plain one, since this conviction is the foundation of his conclusion that he could himself have done the work as well as the advocate did it.

An able writer, and an acute thinker, contrasts the merits and defects of the three great advocates who fought out the forensic contest in the memorable Beecher-Tilton case, and says: "Mr. Beach fills us with admiration of the advocate; Mr. Porter makes us in love with his cause. Mr. Beach lifts us up; Mr. Porter carries us away. When we listen to the one we are afraid we shall yield; when we listen to the other we yield without knowing it. A great actress said that when she played Juliet to Garrick's Romeo she

[9] The Forum, Vol. 2, p. 212. Of Antonius, Cicero says: "All his speeches were, in appearance, the unpremeditated effusion of an honest heart; and yet, in reality, they were preconcerted with so much skill that the judges were sometimes not so well prepared as they should have been to withstand the force of them." Brutus, xxxvii.

felt that she could not deny him access to the balcony; when she played Juliet to Barry's Romeo she felt that she must inevitably descend to him. This expresses the difference between these two orators."[10] The power which the writer attributes to Mr. Porter is that which secures verdicts. It is the power which Lord Abinger and other great verdict-getters possessed, and that which gave them such success.

It is, perhaps, not possible to fully attain this power by art, since it seems the gift of nature;[11] but while it may not be possible to fully attain it by study and practice, yet much may be done in that direction. If the advocate will yield everything to his cause, let it take absolute possession of him to the exclusion of all things else, he will be almost sure to accomplish his purpose. If the case is to him the one thing, the great thing, the real thing, he will treat it in a business way, and if he treats it in that way the means will be adapted to the end, and there will be a straightforward, natural and determined effort to convince the jury that he is in the right. If this is the course pursued there will be an entire concealment of art and neither parade nor theatrical display. Advocates are not actors, nor do they speak under circumstances like those under which actors perform. Men go to the theater expecting—indeed, hoping—to be deceived by the art of the actor.[12] They know that all that the actor does is unreal. In the theater art is admired; in the forum it is distrusted. In the theater men yield to illusions that in the forum they would laugh at as ridiculous, or reject with anger as an insult to their intelligence. Jurors are real men, concerned, as they, at least, believe, with real things. An advocate who so conducts his discourse as to arouse a suspicion that he is playing an actor's part may be sure that the faces in the box will be set against him.

A discourse, above all things, should be made to appear to have a single object—that of setting the case before the jury as it

[10] 12 Alb. Law Journal, 4.

[11] "A man becomes an orator; he is born eloquent." Thoughts of a Parish Priest (Abbe Roux), 54.

[12] Illusions (James Sully), 104.

actually exists. When this appearance can be given a discourse to a jury, and the case so set before them as to be made to appear to be so plainly with the advocate that the jurors will think that they could themselves have done what the advocate has done, the very highest point in advocacy is reached. To attain this point a complete sacrifice of self to the cause is absolutely essential. Great advocates unhesitatingly make this sacrifice, if sacrifice it is, but in truth it is no sacrifice at all, since it brings the compensation sought, and that is, the verdict.[13]

The greatest hindrance to that complete surrender of self to the cause is vanity. This has long been known to rhetorical writers; but, while they have often advised men of the evil effect of vanity, they have not always done so in a practical way. Archbishop Whately has, perhaps, as clearly as any one, directed attention to this fact. He says: "It is a peculiarity, therefore, in the rhetorical art, that in it more than in any other vanity has a direct and immediate tendency to interfere with the proposed object. Excessive vanity may, indeed, in various ways prove an impediment to success in other pursuits; but, in the endeavor to persuade, all wish to appear excellent in that art operates as a hindrance."[14] But there is another consideration, implied, indeed, in what we have said at another place, and that is this: A juror has a pardonable vanity, and when it can be made to seem to him that he could have done as well as the advocate did with so plain a case, two points are gained—the juror's vanity is gratified and his judgment convinced. This joint result can never be reached

[13] Judge Porter, in his cross-examination of the miserable Guiteau, gives as striking an example of the sacrifice of self to cause as can be found in the history of advocacy.

[14] "There are two kinds of orators, the distinction between whom might be thus illustrated: When the moon shines brightly we are apt to say, 'How beautiful is this moonlight!' but in the daytime, 'How beautiful are trees, the fields, the mountains!'—and, in short, all the objects that are illuminated; we never speak of the sun that makes them so. Just in the same way the really greatest orator shines like the sun, making you think of the things he is speaking of; the second best shines like the moon, making you think much of him and his eloquence." Whately's Annotations of Bacon's Essay, "Of Discourse" (Bacon's Essays, 351).

when the advocate wounds the juror's vanity by parading his own superiority, although it is possible, in a very clear case, that, for all that, the juror may yield to his convictions of right and justice.

There is a power in words. Words without ideas are, so far as coviction and persuasion are concerned, barren things.[15] They are husks without kernels. But, paradoxical as it may seem, commonplace ideas, and, indeed, even feeble ones, derive power from strong words. When both the thought and the language are strong there is real power; but a really strong idea may sometimes be so incased in words as to be, so far as a hearer can perceive, deprived of its strength. On the other hand, feeble ideas may sometimes be so girt with words as to seem strong. Strength in oratory does, in no small measure, reside in words. Many an idea is shorn of its strength by a divestiture of its vigorous words as effectually as Samson was of his strength by the shearing of his hair. Apart from the idea, provided always that there is an idea, words are elements of strength. The thought conveyed by the Countess of Dorset in her famous letter to the secretary of Charles the Second, who had assumed to nominate a member of parliament for her, is neither novel nor striking, and yet no one can doubt that her words gave it strength. "I have been bullied," wrote the countess, "by an usurper; I have been neglected by a court; but I will not be dictated to by a subject; your man sha'n't stand." When Justice Heath refused a knighthood, he expressed a strong thought in a strong way. Sturdy in thought and sturdy in words is his saying: "I am John Heath, Esquire, one of his majesty's justices of the Court of Common Bench, and so I will die." Abraham Lincoln was strong in words and in thought at Gettysburg, and his was a strength that time will not impair. Carlyle is not always strong in thought, but is always so in words, and among many real jewels of thought are many imitations, so cunningly set in words that they sparkle like true gems. Choate's words have given a blaze to many a dull thought. But to gather illustrations would carry us too far afield; nor need we enter upon

[15] "Sometimes," says Theodore Parker, "mere emotion impresses; but it soon wearies. Superiority of ideas always commands attention and respect."

the work, for our purpose is, to borrow the words of Lord Bacon, "rather to excite your judgment briefly than to inform it tediously."

The words of power are special words, and the special words of greatest power are, generally, the short, simple and plain ones. A man thoroughly in earnest seldom uses grand words. Possibly a man of books and not of actions, of dreams and not of work, or a man of words and not of thoughts, such as Dominie Sampson, might roll out long words when frightened or excited, but the real man on a real occasion is apt to use short words that ring with meaning. Short words with a special meaning name things, and give them as nearly a real character as it is possible for words to do. Names with a meaning are instruments of power. Power in diction, as well as in thought, is what an advocate most needs. Webster is a true type of power both in diction and in action. "An eminent judge of the Supreme Court of Massachusetts," says Mr. Whipple, "in commending the general dignity and courtesy which characterized Webster's conduct of a case in a court of law, noted one exception: 'When,' he said, 'the opposite counsel had got him into a corner, the way he trampled out was something frightful to behold. The court itself could hardly restrain him in his gigantic efforts to extricate himself from the consequences of a blunder or an oversight.' "[16]

The power of words is shown in the care which men who desire to shield themselves from censure take to call, as Archbishop Trench says, "ugly things by fair names." Bad actions are in no small measure palliated by fair names, and it is for this reason that one who defends a witness, or a party who has been shown to be guilty of some bad act, will use the softest and mildest terms he can command in speaking of it, while he who denounces a wrong will do it in plain, but not coarse, words.

[16] American Literature, and Other Papers, 188. Speaking of the lofty passages in Webster's speeches, the essayist justly says: "They are not mere purple patches of rhetoric loosely stretched on the homespun gray of the reasoning, but they seem to be interwoven with it and to be a vital part of it."

Many instances are collected by Archbishop Trench and by Professor Matthews showing that positive evil has resulted from calling bad things by fair names, and they make good their assertion that there is a morality in words.[17] Bad men seldom give the right name to their bad deeds. The famous petition for a settlement of the partnership affairs of the two partners who "dealt with the travelers on Hounslow Heath" illustrates our proposition. From the time of the pirates that Aristotle says called themselves "purveyors," to our own time, when stage-robbers call themselves "road agents," men have sought to escape the force of words descriptive of their crimes. The advocate who can fix upon a party or a witness who has committed a wrong a name truly descriptive of the wrong will do much to break him completely down; and, on the other hand, the advocate who can adroitly, and without seeming effort, cover up the real nature of the wrong with fair, well-spoken words, will do much to save him from overthrow. If words were needed for no other purpose than that of commenting on the conduct and character of witnesses, an advocate would need, as Shakespeare says, "an exchequer of words."

The art of putting things is, in advocacy, a great art. In every case there are two ways of putting things. Two men may explain the same fact, or give an account of the same occurrence, and the one produce conviction where the other would barely arouse attention, although the matter of the information conveyed by both may be substantially the same. Emerson says of an orator addressing an audience possessing an equal knowledge of the facts, drawn from the same source: "The orator possesses no information which his hearers have not, yet he teaches them to see the thing with his eyes. By the new placing, the circumstances acquire new solidity and worth. Every fact gains new consequence by his naming it, and trifles become important. His expressions fix themselves in men's memories, and fly from mouth to mouth." There is often as much difference between one advocate's way of putting things and another's way

[17] The Study of Words, 99-107; Words and Their Abuse, Chaps. II and III.

of doing it as between one of Landseer's pictures and a chromo printed for distribution with nostrums.

An acute observer of men and things, acuter than most of his cloth, so admirably describes the art of putting things in advocacy that we cannot forbear quoting from him at length: "Nowhere in the world," he writes, "I think, is one so impressed with the value of tact and skill in putting things as in the Court of Queen's Bench at the trial of an important case by a jury. Does not all the difference, as great as between a country bumpkin and a hog, between Mr. Follett and Mr. Briefless, lie simply in their power of putting things? The actual facts, the actual merits of the case, have very little to do, indeed, with the verdict, compared with the counsel's skill in putting them, the artful marshaling of circumstances, the casting weak points into shadow, and bringing out strong points into glaring relief. I remember how I used to look with admiration at one of these great men when, in his speech to the jury, he was approaching some circumstance in his case which made dead against him. It was beautiful to see the intellectual gladiator cautiously approaching the hostile fact, coming up to it, tossing and turning it about, and finally showing that it made strongly in his favor. Now, if that were really so, why did it look as if it made against him? Or, if the fact was in truth one that made against him, why should it be possible for a man to put it so that it should seem to be in his favor, and all without any direct falsifications of facts or arguments, without any of that mere vulgar misrepresentation which can be met by direct contradiction? Surely, it is not a desirable state of matters that a plausible fellow should be able to explain away some very doubtful conduct of his own, and, by a skilful putting of things, be able to make it seem, even to the least discerning, that he is the most injured and innocent of human beings. And it is provoking, too, when you feel that it is all an intellectual juggle; and yet, with all your logic, you cannot on the instant tear it to pieces and put it in the light of truth. Indeed, so well is it understood that by tact and address you may so put things as to make the worse appear the better reason, that the idea generally conveyed, when we

talk of putting things, is, that there is something wrong, something to be adroitly concealed, some weak point in regard to which dust is to be thrown into too observant eyes."[18]

There is a great deal of truth and much of value in what the shrewd parson says, although there may be something of exaggeration. It contains more than one suggestion which may be profitably amplified, analyzed, and studied, even by advocates of experience. It is of no small importance for an advocate to learn what the things are that influence the minds of intelligent men and shrewd thinkers, since these are the things he most needs to discover and make instruments of his power. Our "Country Parson," at all events, observed with a keen eye, and saw very clearly the strong points of a jury speech. His words are almost as important for what they do not express as for what they do express, for he makes no mention of well-rounded periods or beautiful metaphors, and the silence of such an observer is significant. What impressed him was the tact and skill in arraying facts, inventing and arranging arguments, explaining events and occurrences, and giving tone and color to testimony and circumstances. There are, as he suggests, things to be cast into the shade, things to be put into the background, things to be brought into the foreground and into the best positions, with all the light attainable poured upon them. Arrangement of position, shading and coloring, foreground and background, are as necessary in a forensic speech as in a picture. Method arranges the position for the figures of the mental picture; explanation, narration and description construct the figures; and plausibility and probability color and shade them. With the shading and coloring materials the advocate needs to do as a great painter advised a poor one to do with his colors, "mix brains with them."

Tact is essential in a jury speech as well as in the conduct of the trial during the delivery of the evidence. "Talent knows what to do, tact knows how to do it." It is, indeed, almost as important to know how to do a thing as to know what to do, but the advocate must combine both these faculties, for if he

[18] Recreations of a Country Parson (Fields, Osgood & Co.), 43.

lacks either he will be vanquished in all close contests. But the word "tact" does not adequately name the faculty required by an advocate, unless, indeed, we assign to it a deeper meaning than that ordinarily given it. An advocate needs to be an adroit maneuverer, quick of judgment and keen of perception, but he needs to be something more. A quality deeper and profounder must be added, and, as nearly as any word can name it, that quality is sagacity.

Sagacity combines keenness and quickness of perception with soundness of judgment.[19] It is one of the essential properties of common sense, but it is also something more, as we conceive, than what is usually called common sense. Without common sense it cannot exist, but not all men of common sense are sagacious in the true sense of the term. "Sagacity," says Aristotle, "is a certain happy extempore conjecture of the middle term, as if a man, perceiving that the moon always has that part lustrous which is toward the sun, should straightway understand why this occurs, viz., because it is illuminated by the sun; or, seeing a man talking to a rich person, should perceive that it is in order to borrow money of him, or that persons are friends because they are enemies of the same person, for he who perceives the extremes knows all the middle causes."[20]

It is this faculty that enables the advocate to conceive and frame hypotheses that will account for or explain events and occurrences. It is because it involves soundness of judgment that it restrains one from making maneuvers which will accomplish no practical result. A mere tactician might execute the maneuver for the sake of displaying his skill, but a sagacious man would not be betrayed into doing a useless thing. Tact with-

[19] Sir Humphrey Davy said: "This power of divination, this sagacity, which is the mother of all science, we may call anticipation. The intellect, with dog-like instinct, will not hunt until it has found the scent. It must have some presage of the result before it will turn its energies to its attainment." Quoted by Dr. John Brown in his essay entitled "With Brains, Sir." Whipple says: "That seemingly instinctive sagacity by which an able man does exactly the right thing at the right moment is nothing but a collection of facts assimilated into thought."

[20] The Posterior Analytics, Chap. XXXIV.

out soundness of judgment may make men attempt what they cannot accomplish. Tact may sometimes evade resistance, but sagacity will suggest means of boldly encountering and overcoming it. Sagacity will often suggest that what cannot be denied had better be explicitly granted and explained, while tact is very likely to suggest an evasion that is nothing more than a half-concealed contradiction. A mere tactician is often "doomed to conquer only where nothing is to be gained, and to be defeated where everything is to be lost." A sagacious man cannot, indeed, accomplish all he undertakes, but whatever he undertakes he will do as well as the tactician, and without discredit to his ability or his integrity. Sagacity and, indeed, true tact forbid the employment of mere tricks, and condemn the falsification of facts. It is sagacity that looks along the line to be traversed and gives warning of its dangers, and it is tact that maneuvers to escape them; but sagacity will restrain the use of any unfair trick, though it may not forbid the employment of a stratagem not dishonest or vile. Tact is not cunning in the sense in which that word is usually employed, for it does not imply that there should be any dishonesty or unfairness. Tact, in short, is doing the right thing adroitly after sagacity decides that it is the right thing.

The art of putting things depends in no small degree upon the sagacity and tact of the advocate, for no matter how well he may know the facts or the law, he will not accomplish very much unless he knows how to use these materials. "Men may have the gifts both of talent and wit, but unless they have also prudence and judgment to dictate the when, the where, and the how those gifts are to be exerted," their gifts will not avail them in practical affairs, for a sagacious man, with much less wit and talent, will vanquish them in almost every closely contested case. Sagacious men adapt their style to their subject, and their arguments and explanations to the capacity of those whom they address; but whatever they do is done for the purpose of securing the verdict.

What gave Webster his influence was, as Mr. Whipple says, "his power of so putting things that everybody could understand

his statements, and his power of so framing his arguments that all his steps from one point to another, in a logical series, could be easily apprehended by every intelligent farmer or mechanic." These are, undoubtedly, the great virtues of the art of putting things. Emerson, indeed, assigns to method the chief place in oratory, for this, he says, is what gives one man, having the same information from the same sources, such great mastery over his hearers. But to entitle method to this high rank it must be taken to be much more than the mere plan or scheme of arrangement, since, to secure for a discourse that power which Emerson ascribes to it, there must be probability and plausibility interwoven into the facts and arguments. The method which Mr. Whipple so justly attributes to Webster is, no doubt, the true one, for arguments which seem to arise naturally and follow in natural sequence are ever the most powerful. What is true of argumentation is true, even in a higher degree, of the statement of facts. Erskine is an excellent model in this respect, as he is, indeed, in all respects; for so clear and natural is his method that fact seems to arise out of fact, and fact follow fact, as certainly as the sequences of nature.

It is the end to be attained and the materials to be used that must determine the method. It is no more possible to determine what method shall be adopted for a discourse until the materials of the case are fully known than it is for a man to determine how he will go to a place of which he has no knowledge. Doubtless, some of the rules given in the treatises on logic and rhetoric are of value, but there is almost as much danger of harm from a rigid adherence to them as from a complete departure from them. The only sure general rule is to look clearly to the end, and from the means at hand select the best method of reaching that end. Men who have never read a page of a treatise on logic or rhetoric are often strong before a jury, and the chief reason is that their method is a natural and not an artificial one. There is much of truth, although not a little of error, in Macaulay's strictures upon Quintilian and rhetorical writers of that class. But while an unreasoning obedience to arbitrary rules may induce the adoption of an artificial

method not fitted to the particular work before the advocate, still these rules are by no means unimportant. The danger is not in knowing these rules, but in not knowing enough else; that is, not knowing when, where and how to use them. What Napoleon said of the art of war is true of the art of advocacy: "All the great captains have performed great achievements by conforming with the rules of art, by adapting efforts to obstacles."

Facts are the principal materials out of which an argument to the jury is constructed. Matters of law, it is true, enter into it, but the body of the discourse is composed of the facts extracted from the evidence. The work of analyzing the evidence and extracting the facts must be done by the advocate, and not entrusted to the jury. The evidence is the source from which the facts are obtained, but it is not the evidence which is to be embodied in the address. The analysis, to be effective, must be thorough, and the rule which should govern is this: Eliminate the irrelevant, immaterial and improbable facts; accept the material, relevant and probable facts, with their subsidiary or supporting facts. The analysis, if well conducted, will show that many things appearing in the evidence are to be rejected as irrelevant and immaterial; that others are to be rejected as resting on untrustworthy testimony, and that others are to be rejected because of their improbability. It is true of almost every case that the controlling facts are few, no matter how great the body of the evidence. In conducting the analysis, all the evidence must be considered, since a declaration, or a circumstance, taken by itself, may be of little importance, but when taken in connection with other evidence it may be of controlling force. An apparently trivial circumstance may sometimes be the connecting link in a chain of evidence, making it complete and perfect.

Facts are scattered through the evidence, and many of them lie there in obscurity, so far as the jurors perceive. This may not be true in every case, but it is the assumption upon which the advocate should ordinarily proceed, and, proceeding upon it, he will remove the obscurity which veils them, and bring them into the light. It is the business of the advocate to gather the facts and so arrange them that the jury may perceive their char-

acter and effect without any great mental effort on their part. The work subsequent to the analysis is that of revisal and reconstruction. It is to be remembered that the juror's knowledge of the facts is derived from the testimony, and not from observation, so that it is not of the highest or most certain type. It is communicated orally, and without time to accurately judge of its value and effect, and for this reason particular pieces of evidence are sometimes wrongly estimated, and the influence of the evidence as a whole is not justly perceived. The advocate, bearing this in mind, must treat the evidence as a whole, although, of course, some of it must be discussed in detail. He must not allow any favorable piece of evidence to be considered without the attendant circumstances supporting it; nor, on the other hand, should he allow any unfavorable piece of evidence to be considered apart from the circumstances which impair its value or its trustworthiness.

Facts supply the groundwork for the discourse, and, in the main, for the fabric erected upon it; but the discourse must be much more than a catalogue or inventory of bare facts. Much more is required than a simple statement of each independent fact. The connection between the facts must be shown, their probability or improbability asserted, their value must be exhibited, and their truth vindicated or their falsity exposed. Inference, explanation, narration, description, definition and argumentation all enter into the discourse in complex cases. The range is a wide one. The nature of the proofs must be stated and application made; fallacies must be detected and exposed; the completeness of the line of evidence must be pointed out on the one hand, and its defects exposed on the other; stress must be laid upon the strength of the advocate's own evidence, and the weakness of his adversary's fully revealed; the weak places in the opponent's case must be made apparent, the strong ones in that of the advocate made conspicuous; testimony must be analyzed; the conduct of witnesses must be discussed, their credibility considered, and the probability or improbability of their stories be shown; arguments and proofs must be advanced; arguments and inferences must be met and refuted, and the con-

sequences of the verdict must be fully pointed out. Persuasion and conviction are the ultimate objects to be attained, and whatsoever aids in attaining them must be brought into effective use.

Macaulay pronounces Hume an accomplished advocate, and in describing his methods points out with clearness and precision, although not with entire accuracy, the course advocates usually pursue. This is what the great essayist says: "Hume is an accomplished advocate. Without positively asserting much more than he can prove, he gives prominence to all the circumstances which support his case; he glides lightly over those which are unfavorable to it; his own witnesses are applauded and encouraged; the statements which seem to throw discredit on them are controverted; the contradictions into which they fall are explained away; a clear and connected abstract of their evidence is given; everything that is offered on the other side is scrutinized with the utmost severity; every suspicious circumstance is ground for comment and inventive; what cannot be denied is passed by without notice; concessions are sometimes made, but this insidious candor only increases the effect of the vast mass of sophistry."[21]

A statement of a fact is not any the stronger because the advocate vehemently protests that it is true. An address filled with naked assertions is always feeble. An argument is not made more forcible by mere declarations that it is conclusive. Assertian is not proof, nor is affirmation argument. Many advocates "do protest too much," for overmuch protestation arouses suspicion, and suspicion bodes no good to the speaker. An advocate who advances an argument and straightway proclaims its conclusiveness invites suspicion. A man who makes a statement and at once loudly asserts its truth is as unwise as he who ran about the streets crying, "Lo! I am an honest man."

[21] The brilliant and keen critic was himself a great advocate. His rhetoric was more dazzling than Hume's, and his unfairness more skilfully concealed. In the defense of his hero, King William, and in his arraignment of William Penn, Macaulay displayed both power and cunning. In his denunciation of Barère, he strikingly illustrates one phase, and that by no means the best, of advocacy. But Macaulay was not always an advocate, for he often rose to the position of a just judge, as in the case of Milton.

arguments on questions of fact the plain and strong appearance which so forcibly commends them to the jury is that of clear, probable and plausible explanation.

An explanation, while not what in technical logical language is denominated an argument, is a means of proof. Not all proofs, by any means, are arguments in the strict sense of the term, although all valid arguments are proofs. The great body of a forensic discussion of facts consists of proofs, but proofs are not always arguments in the restricted sense of the term, although in a more liberal sense they are arguments, since they tend to produce conviction. Advocates, misled by the name given to the speeches to the jury, sometimes leave out of mind the other great elements of proof, and confine their discourses too much to pure argumentation.

Explanation is an element of great importance in every forensic discourse. Facts lie scattered through the evidence, and as the last words of the witnesses fall upon the ears of the jury, there is before them, in every intricate case, a confused mass. Facts are buried under a mass of details, and lie there hidden by an accumulation of rubbish and obscured by many apparent inconsistencies. As the explorer among the ruins of a buried city digs his way to things of value, casting aside the rubbish and searching only for the valuable things hidden by it, so must the advocate dig his way through the testimony, and from it take out the important facts and cast away the rubbish. It is the business of the advocate to clear away confusion, remove obscurities, and present facts so that they may be perceived and understood. The jury must be made to understand the facts. It is not enough to range the facts in a row like urchins in a class at school, but the nature of each fact must be exhibited; their relations to each other must be shown, their relation to the law must be made known, and their probability demonstrated. The work is but clumsily done if no more than the bare facts are presented. They must be explained, that is, the jury must be made to understand their nature and effect; and to accomplish this the character of the testimony by which they are supported must be shown, the conformity of the results of testi-

mony to experience must be established, and the consequences to which the facts lead must be laid before the jury, so that they may not only see what supports them, but may also understand their meaning and effect. The work is one of difficulty, and requires an absolute mastery of the evidence and the facts on the part of the man who undertakes it. No one can explain what he does not himself understand. He will fail as signally as Bardolph failed in his attempt to define the word "accommodated."

To make the jury see and understand the ruling facts is the chief object of an explanation. The facts themselves must be made clear and brought fully into the foreground, each fact being assigned a position of prominence commensurate with its importance, and each must be explained as position is assigned it. Some facts, to be sure, need no explanation, for a statement may enable the jury to understand them, and it would be folly to undertake to make plain what is already understood. But it must not be forgotten that facts which seem to the advocate easily understood are not always understood by the jurors. The study of the advocate has, if he has done his duty, been earnest, concentrated and deliberate, while that of the jurors has been comparatively hurried, and neither earnest nor persistent; so that, even if jurors were as well trained in eliciting and understanding facts as the advocate, they would not so fully measure their value, nor so well understand their force and effect. But facts clear in themselves and understood when stated, may need to have their relation and connection with other facts clearly stated in order to bring out their full probative force. The nerve of connection must be shown, for in every contest upon facts there is a nerve of connection, and if this be cut off or remain unseen, much less force is acquired. The medium of connection is something more than a mere chain of connecting links; it more closely resembles the nerves which connect the organs of a living being than the links of a metal chain or the strands of a hempen rope. This medium of connection is, in some sort, a thing of life; it is not a physical fact, nor a series

of physical facts, but a moral or mental force that gives the facts coherence, vigor and power. The difference between an explanation clearly exhibiting the medium of connection and one not exhibiting it will be readily perceived by one who compares an explanation of a successful advocate with that of one who, though he makes what he himself thinks great speeches, gets few verdicts. Without this medium of connection, explanations—and narratives, even in a stronger degree—are nerveless and powerless.

An explanation of a fact is much more than its statement or description. Statement and description usually precede explanation, but they do not always include it. The lines which separate explanation from narrative and description sometimes fade into each other so that it is not always easy to accurately mark the place where the one begins and the other ends; but, however interesting this question may be as one of formal logic or of rhetoric, it is of no great practical importance to the advocate. It is enough for him to put the facts so clearly that the jury may understand them in all their bearings, whether it be done by way of description, narrative or explanation. But where the line of separation is plain, then the explanation must not be confused with the narration or description, for, if it is, disorder and obscurity will result. A method which mingles these elements where the line of separation is distinct is always a faulty one. Explanation may, and does, indeed, often form a subsidiary part of narration; but when it assumes that position care is required to prevent it from breaking the line of connection which gives coherency and perspicuity to the narrative.

Many elements enter into an explanation. This is true in many instances of what, viewed in itself, seems a simple fact, and the more complex the fact the more elements enter into the explanation. Take, for example, the simple fact that Roscius struck Fabius; the explanation of even so simple a fact requires an investigation and exposition of the motive which induced the act, for this, when explained, may show that the act was done maliciously and intentionally, or that it was done in self-defense. Nor, in ordinary cases, will the explanation end with this, for

an analysis of the circumstances may show that the act was purely accidental. If the case be a criminal prosecution this would absolve the defendant, unless another element should be discovered, that of criminal carelessness. If, however, the action be for damages, then the explanation would, on the one hand, be directed to showing that ordinary care was omitted, while on the other the advocate would so explain the act as to make it appear that ordinary care was exercised. Take an example of a somewhat more complex character, as, for instance, the fact that a man is found dead, and there are no external marks of violence. The cause of his death would naturally be assumed to be either disease or poison. To determine the cause of his death analysis of the contents of the stomach may be all that is required, for it may be that the analysis will reveal the presence of poison. In such a case, the only explanation the prosecution would feel called upon to give as to the cause of the death would be an explanation of the analysis and of the effects of the poison. But this would only be a step in the case, for it would accomplish no useful result merely to prove the cause of the death, and the further step must be taken of ascertaining whether the man committed suicide or was murdered. This step would involve an explanation of the motives, the intention, the opportunity, and the power of the accused to commit the murder; while, if the theory of the defense be that it is suicide, his counsel would be called upon to explain why the deceased took his own life, and this would, it is obvious, involve many more explanations. But cases are most often much more complex than that supposed. Thus, in the case of Palmer it became necessary for Lord Cockburn to show that Cook died from poison and not disease, and this work was a difficult one, for the poison was of such a subtle character as not to be detected by analysis. The most powerful part of Lord Cockburn's address in that case is that in which he explains the effects of poison, and discriminates between the indications of death from that cause and the indications of death from disease.

In civil cases the work of explanation is, ordinarily, more difficult than in criminal cases. In contested-will cases, for ex-

ample, explanation is very frequently a work of great importance and difficulty. A child, we will suppose, is disinherited, and this, we will further suppose, the plaintiff assumes is one among other facts proving want of testamentary capacity. His initial proposition will be that natural affection prompts fathers to treat their children alike, and he will ground his explanation upon the hypothesis that natural affection controls, except where mental unsoundness destroys the natural instincts of a father. His opponent's explanation will be, most probably, that the behavior of the disinherited child, or the liberality of previous advancements, impelled him to cut off the child. In this case, the explanation will be chiefly of the motive and its cause, and around this, as the central point, all subsidiary considerations will cluster. The explanation will carry both parties into a great field, and involve many elements. Recondite questions of mental processes, and moral ones involving love, affection and duty, will be within its scope. To take another illustration from a different class of cases: A man falls into a pit near the line of a highway. Here an explanation is called for, involving the action and conduct of the injured man, as well as of the defendant. Once again, an engine, we will suppose, explodes and injures a bystander. Here a great and difficult part of the work will be that of explanation.

Enough has been said, we assume, to show what an important part of forensic addresses upon questions of fact explanation forms, and it now remains to offer some suggestions as to the method of performing that work. First of all, be it repeated, the object of an explanation is to make the thing explained clearer and more distinct. This, as a general rule, is not done by verbal changes in the structure of the language offered as explanatory of that which requires explanation. Where there is nothing more than a mere change in the form of the words there is definition, and not explanation—and it may be said, by the way, that such a definition is seldom a valuable one. Keeping in mind the great object of an explanation, the advocate will seek assistance from every quarter, so that he may make

what he endeavors to explain so clear and plain to the minds of the jurors that, without any great mental effort on their part, they may fully understand it.

Comparison is a great help to the advocate in the work of explanation. But to make this work effectual, things that are in themselves plain and easily understood must be taken as the basis of the comparison. It will not do, as we have said, to state the thing, act or event to be explained, in a different set of words; nor will it do to take as the basis of the comparison that which is no better understood than that which is to be explained. The process must go from the things clear to the things assumed to be obscure. The true procedure is from things well known to things not clearly understood. The comparison we have in mind is not a mere verbal figure, but a comparison of things with things, or thoughts with thoughts. Such verbal figures doubtless do add energy to the diction, and impart a clearer meaning to the words; but, after all, they are not the substantial, unfailing helps to real progress. Comparison is, indeed, a fundamental law of thought, but we here employ the term in a narrower sense than that in which logicians ordinarily use it. Our purpose is to make plain the advantage of taking some familiar thing, act or event, as the basis of comparison, and, proceeding upon it, making clearer the thing, act or event we undertake to explain. An advocate can use to a good purpose a vast stock of examples drawn from things known and understood by the jurors, since they serve not only as the groundwork for comparison, but, also, as the foundation for other elements of a forensic address. Here, however, we are immediately concerned with examples as a medium of comparison for the purposes of explanation.

Where the advocate explains by means of examples, he may either take examples from real life or, by the aid of his imagination, construct his own. Thus, a prosecutor seeking to satisfy a jury that there was a motive influencing an accused to murder may explain and account for the prisoner's act by referring to the assassination of President Lincoln by Booth, to the case

of the murderer Williams,[23] to that of the murderer Burke,[24] to that of the murderer Blandy,[25] to that of the assassin Harrison,[26] or to that of the murderer Buford,[27] and from these examples explain to the jury how various are the motives that impel men to commit murder, and how often the motives seem to good men to be wholly disproportioned to the wickedness of the deed.

A wrong may often be mitigated by explanation by the method of examples. If Professor Webster's counsel had adopted a different theory, and, in explanation of their client's acts, had proceeded on the hypothesis that he killed Dr. Parkman on a sudden heat, and that fear impelled him to burn the body of his victim, they would, it is probable, have saved their client's life, for actual examples illustrative of their explanation, and in strong confirmation of their hypothesis, could have been readily obtained. It is not our purpose to go far into this phase of our subject, for that would lead us into a discussion too extended for the limits of our work, and we leave it with the suggestion that he who has at hand a great store of apt examples need not be at a loss for explanations and illustrations.

Actual examples are, however, not always at hand. When examples of that kind cannot be obtained, the advocate must create, or he must borrow from others. The process of creating examples for use in explanation is that of conjecture; not a wild, unscientific conjecture, but a conjecture framed by the imagination under the command of the judgment. At bottom, the process is that of framing hypotheses. The object to be attained, kept constantly in mind, will restrain the imagination to its legitimate work. It is not for the sake of display, be it always remembered, that examples are constructed, but for the sake of forcing into the minds of the jurors, and there lodging, the points of the case. An example created for this purpose will

[23] Rex v. Bishop *et al.*, 2 London Legal Observer, 39.
[24] Rex v. Burke, Celebrated Trials, 42.
[25] Rex v. Blandy, 18 St. Trials, 1117.
[26] Rex v. Harrison, 12 St. Trials, 883.
[27] The assassin of Judge Elliott, of Kentucky. John Chislie's case is of the same type.

seldom fail to be effective. An effective example is one that is relevant to the point sought to be established or reinforced, that conforms to experience, and is clad in the apparel of probability. The mistake, and it is a grave one, is sometimes made of creating an example that is more obscure and more improbable than the thing it is adduced to explain. The very opposite of this is, as we have already suggested, the true method. Examples must enlighten, not darken, the minds of those who are to be convinced or persuaded. An example from the profession or business of the jurors, when clear and opposite, is of the most useful character. Such examples address themselves to the experience, and, though never so homely, carry a weight that other examples, however sparkling, cannot have. An appeal to experience, wisely made, seldom fails to secure a lively response.[28]

The field of literature supplies many examples that the advocate can use with great effect. He may borrow from books without stint. A dwarf may see farther than the giant who carries him, and so an advocate may make more effective practical use of what he borrows from the giants who live in their books than they themselves were able to do. In borrowing examples imagined by others, care should be taken to avoid gathering those that are worn out by constant repetition, and, on the other hand, to avoid those that are far-fetched. If worn-out examples are employed, little impression is made, and the discourse is enfeebled; if those that are far-fetched are called into service, the naturalness so essential to the strength of a discourse is marred, and force is lost. There are, of course, exceptions to this general rule, for it is sometimes expedient

[28] The following anecdote is vouched for by several of Lincoln's biographers. In explaining to the jury the meaning and legal effect of self-defense, he said: "My client was in the fix of a man who was carrying a pitchfork along the country road when he was suddenly attacked by a vicious dog. In the trouble that followed, the prongs of the pitchfork killed the dog. 'What made you kill my dog?' the farmer cried in rage. 'What made him try to bite me?' 'But why didn't you go at him with the other end of the pitchfork?' 'Why didn't he come at me with the other end of the dog?'" It is said that the jury saw what was meant by self-defense.

to employ well-worn examples, and, on the other hand, it is sometimes wise to employ those that are brought from afar. Macaulay errs in one direction—that of adducing unknown examples; but most of our advocates and public speakers err in the other.[29]

There are, it is obvious, various forms of explanations. Mental states, as motive and passion, require explanation; real, tangible things require to be brought before the jury by means of explanations, and so do events and occurrences. It is not possible for us now to discuss in detail these various forms of explanation, and it is doubtful whether a discussion would not be profitless. If it is kept resolutely in mind that the explanation is made for the purpose of proof, and that the proof is adduced to secure the verdict, mistakes will seldom be made; but if explanations are made for the mere purpose of exhibiting the advocate's ingenuity or talent, the probability is that the client will suffer, and the cause be lost. If an explanation does not reach the position of proof it is valueless, if not positively hurtful.

The refutation of an explanation is the refutation of a proof. It is a singular and interesting fact that theories have been accepted as true and acted upon for ages simply upon the proof supplied by a plausible explanation. This is true even in the inductive sciences, and in matters open to observation and experiment. It is also true that as these explanations were refuted the systems which they supported fell, and new systems, founded on new explanations, arose, in their turn to fall before more plausible and reasonable explanations. It is not too much to say that the principal initiatory methods of attack, and the most successful ones, have, in most cases, been those directed against the explanation given as the support of a theory. This is true of the theories of astronomy, of the laws of motion, of the laws of heat, of the laws of light, the laws of chemistry and the laws of physiology.[30] It was by destroying the explanations in many

[29] Who has not grown weary of the "mad boy who fired the Ephesian dome?"

[30] A study of Prof. Whewell's History of the Inductive Sciences will verify this assertion.

instances, rather than by observation and experiment, that unsound theories were first shaken. In the deductive sciences explanations were even more powerful than in the inductive. The history of the exploded systems of mental philosophy, of political economy and of logic is little more than a history of explanations serving for a time as proof, and finally yielding to others more powerful. It is quite certain that in all the branches of science explanations have been potent instruments of proof, and that the refutation of these explanations has carried down the systems which they supported.

The first care in refuting an explanation should be to ascertain whether all the facts assumed as supplying the basis of the explanation do actually exist. This, when suggested, seems scarcely worth the mention, since it is so obviously true; but, for all that, it is worth the mention. Learned men, and men with their attention aroused to the work before them, have been misled by an assumption which a direct examination would have destroyed. This is illustrated in the familiar instance given in the books of logic of the question of King Charles the Second to the members of the Royal Society. These wise men, instead of setting to work to ascertain whether it was true that a live fish did not add to the weight of a vessel of water, gravely attempted to ascertain why it did not do so. The history of scientific discovery reveals many similar instances. Thus, the Copernicans admitted without examination the assertion of their opponents that a ball dropped from the mast-head of a ship in full sail does not fall at the foot of the mast, but nearer the stern of the vessel, when, in truth, an examination of the assumption would have shown that it was utterly without foundation. The forensic addresses of Cicero afford many illustrations of assumptions that will not bear examination. In his addresses these assumptions, for the most part, take the form of questions, and this is the form in which adroit advocates generally clothe them. A question confidently asked is very apt to mislead, although it may involve a false statement. Statements that are not founded on facts are seldom directly made; in general they are insinuated by a question, or in some other covert manner.

We often hear advocates ask, What was the motive of the party in entering into the contract? where the issue is whether he did enter into the contract. So, too, we often hear them asking, What caused the vacillating, hesitating manner of the witness? when, in truth, the question has no foundation in fact. It is, of course, not so difficult, when there is time for deliberation and thought, to detect these undue assumptions; but in the excitement and turmoil of a trial it is far otherwise. Men are there often misled, and expend much precious time and ingenuity in answering a question, when half the time would suffice to show that there was no foundation for the question. Before being drawn off by a question, the person called upon to answer should, first of all, ascertain whether there is any reason for the question, or any ground upon which it can be justified. A vigilant guard should be kept, and no question be permitted to insinuate or assume a fact that does not exist. Dissection is a good remedy for unfair questions. This process not only enables the advocate against whom they are used to ascertain whether the question has any foundation in fact or reason, but it also enables him to ascertain whether the question, which in appearance seems to be one only, is, in truth, more than one.

Many advocates, and experienced ones, too, have been led a fruitless chase by assumptions couched in questions that might have been avoided had the questions been analyzed. Judges are often self-deceived by asking themselves questions involving undue assumptions, and then answering the questions as if there were no vice in them. Thus, a judge asks, "Why did the plaintiff not object at the time the bill was presented to him for payment?" and then proceeds to argue that, as he did not object, the presumption is that the bill was just, whereas the assumption that he did not object was entirely groundless. In another case, a judge asks himself: "And can it be that legislative discretion shall be controlled in the matter of violating a contract, and not where it annihilates a great pursuit, involving millions of dollars and innumerabe contracts?" This question involves an assumption that legislative discretion may be controlled in the matter of violating contracts, when, in fact, it is not true

that legislative discretion can be controlled by the judiciary in any case, although it is true that the constitution absolutely prohibits the legislature from enacting any law impairing the obligation of contracts. If judges, in the quiet of the study, and with the advantages of the argument of counsel, can be thus deceived, what wonder that advocates often are misled? Questions are favorite abiding places for fallacies. Questions asked as a means of explanation are especially so, and a vigilant guard needs to be maintained to prevent deception. The safe course is to rigidly scrutinize each material question asked, and not to attempt an answer without first ascertaining what assumption it contains. A question asked in explanation may, as a general rule, be suspected, and instead of presuming it a fair one the presumption should be, until the contrary appears, that it is unfair, in the sense, at least, that it contains an undue assumption.

Another inquiry essential to the successful refutation of an explanation is this: Are the facts relevant? Facts may be true and not relevant, and if not relevant they lend no support to the explanation. Facts must be both true and relevant. What is relevant, and that only, tends to prove the point in dispute, or supply grounds for an explanation. It may be perfectly true that a real physical fact exists, and yet be also true that it has no probative force upon the particular point. Shakespeare supplies an apt illustration of the proposition we assert. He makes Jack Cade assert that the eldest son of the Earl of March "was by a beggar woman stolen away," and that he was his father, and for corroboration he has one of his associates say, "Sir, he made a chimney in my father's house, and the bricks are alive to this day to testify it; therefore, deny it not." Archbishop Whately refers to evidence of a similar character, which is often accepted as relevant and trustworthy. "Truly, this evidence," says the Archbishop, "is such as country people give one for a story of apparitions. If you discover any signs of incredulity they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and, perhaps, even the tombstone of the person whose death it foretold."

The irrelevancy of the physical facts or actual occurrences

used by advocates is not, as a general rule, readily perceived, for the coloring is so strong, and the shifting of positions so quickly and dexterously executed, that the irrelevancy, even though it is absurd, is not always seen. Vigilance and care are requisite to prevent deception. Many jurors, as well as many advocates, have been deceived by the parade of facts that were totally irrelevant to the point which the disputant professed to make clear. A frequenter of courts often hears facts dilated upon, which are entirely without force, although in themselves indisputable. This is especially true where the advocate assumes to explain an act or occurrence. Physical facts which no one disputes are seized as means of explanation, although they have no conceivable bearing upon the matter which the speaker professes to explain. An array of incontestable facts is sometimes so adroitly made that it seems to supply a solid foundation for the explanation, when the truth is that they yield it no support at all.

Nearly allied to the fallacy of assuming irrelevant facts as the groundwork of an explanation is that of bringing forward examples that appear to furnish legitimate means of explanation, but, in truth, do no such thing. The sophist who resorts to this artifice selects or invents examples and illustrations, and, by magnifying the points of resemblance and concealing the points of difference, creates the appearance of a successful explanation, although there is actually no explanation. There are explanations in advocacy, as well as in metaphysics, that do not explain (perhaps not so abundant in the one field as in the other), for men assuming that a similarity exists where, in fact, there is none, go from error to error, and yet so swift is the movement and so skilful the process that keen and sagacious men are deceived. When an example is brought forward as a means of constructing an explanation it is well to seize it and hold it long enough to see whether it is a real representative of the thing it professes to be, or a mere pretender.

Men are often deceived by a partial explanation which professes to be a complete one, but which leaves untouched many parts of the matter it assumes to explain. The legerdemain

which enables a cunning advocate to make a partial explanation appear to be a complete one is a potent instrument of deception. By rapidly moving the facts about, by adroitly obscuring some and repeating others, by arranging and coloring the favorable ones so as to make them conspicuous, and by insidiously slurring the adverse ones and putting them out of sight, an explanation is made to seem complete and satisfactory when, in fact, it is logically no explanation at all. A partial explanation, both plausible and probable, can often be given where a complete and valid explanation is impossible. In most instances a partial explanation can be given without departing very far from the truth. A quiet assumption here and there slipped in, a suggestion deftly made, an example stated and an analogy assumed to exist between the supposed case and the real one, a fact shifted from one position to another, a fact suppressed, a connection that does not exist imagined between an act and the producing cause; these, and other like artifices, may give such an appearance to an explanation as will make it pass for ten times its value, for, while such things give an entirely inaccurate effect to the explanation, there is not a very wide departure from the line of truth. The art is to keep so near the line of truth that the false may seem the true.

One form of an incomplete explanation "consists," says Professor Lotze, "in assigning a general cause for some phenomenon without inquiring if the cause assigned will account for the particular modifications to which the phenomenon is subject."[81] This form is a peculiarly deceptive one, for it assumes what is conceded to be a general truth, or principle, and then, putting out of sight the modifications, or peculiarities, of the particular case, covertly assumes that the case is governed by the conceded general truth. To illustrate: Suppose that Roscius kills Fabius; that the slayer was the determined enemy of the slain, but that Fabius was the assailant, and so violently attacked Roscius as to place him in imminent danger. In such a case, an explanation that the motive which influenced Roscius was hatred or revenge would be incomplete, because, while it is founded on

[81] Logic, 289.

a general truth, it does not meet the case as modified by the fact that the slayer was attacked by the slain. Actual cases are, of course, not ordinarily so plain as that given as an illustration, and yet jurors have been misled by explanations little, if, indeed, any, more satisfactory than that indicated in our example. The general truth is amplified, is repeated in many forms, and is kept constantly before the jurors, by the cunning disputant, and they are led to believe that all that remains for them to do is to apply a principle which nobody questions to a case which it justly controls.

The adroit advocate makes his explanation complex, employing many words and many illustrations. "When he practices to deceive," he weaves "a tangled web." Such facts as serve his purpose are made to assume various postures. The truth favorable to him is amplified, and the favorable probabilities are magnified. By dwelling upon the facts that make in his favor, he obscures those that make against him. By protesting that his explanation, valid in part, is valid in its entirety, he hides its infirmities, and secures for it the approval of the jurors. By amplifying the few places that are strong, and parading about them many illustrations, he draws attention from the many that are weak, and thus they escape exposure.

From the many cases in the books in which jurors have been misled by the artifice of making an incomplete explanation appear to be a complete one, the celebrated Lapeer case, that of the People v. Bainard, may be selected as an illustrative example. In that case the defendant was madly in love with the husband of the woman she was accused of having murdered. Her apparel and her person, shortly after the death of the deceased, showed that she had been engaged in a struggle with some one, and soon after the time of the deceased's death she entered the church of the man she loved very late, and was much confused. The deceased was found dead in her home. In her dying declaration she affirmed that the defendant had killed her. The theory of the counsel for the defense was that the coal-oil lamp near which the deceased was sitting had exploded, and burned her to death. Their explanation of the dying declarations was,

that the deceased was very jealous, and was dreaming when the explosion occurred, and that her dying words were prompted by her dream. The marks of violence on the defendant were explained by the hypothesis that she received them from a fall on the crusted snow which covered the streets of the village. It needs but little scrutiny to detect the incompleteness of these explanations, but, for all that, the accused went acquit.[82] A strong and vigorous analysis, joined to a stern and resolute effort to bring and hold the minds of the jurors to experience and probability, is the surest method of exploding fanciful explanations; and if the minds of the jurors can be kept down to the actual lessons of experience, and to the occurrences of real life, wild and fanciful explanations will seldom influence them.

The description of a place is often an important part of a forensic discourse. It is no easy task. Acuteness and discrimination are required to decide what to say as well as to decide what not to say. Writers of fiction are fond of describing places, but their readers are seldom fond of reading their descriptions, and the leaf or leaves containing them are passed unread. Two faults generally exist: A sacrifice of sense to sound, and an unnecessary prolixity of detail. These faults are not confined to novelists, for advocates frequently commit them. Fine language, as it is called, generally makes a feeble description. Strong, bright, simple words are best. Prolixity of detail mars the work. Better a few bold, deft touches than many feeble or straggling ones. Better leave something for the hearer to supply rather than weary him with details. Herman Lotze states the true principle: "In describing, we try," he says, "if we understand our business, first to fix the main outlines of the whole idea, whether this be done by a simple construction or by taking as illustrations similar things already known, and proceeding by alteration and transposition, by the removal of some features or the addition of others, to elicit from them the leading lines of the picture we wish to convey. Then we fill in the mass of details, never completely, for they are usually inexhaustive, but

[82] This case also furnishes an example of a very bold and ingenious theory, proving that sometimes the most daring theories are the best.

skilfully selecting those by the mention of which we may hope that the hearer's attention will be at once stimulated to supply from his own memory those that are not mentioned. We need but remind the reader of the wonderful effects which the poet produces in this manner, bringing the whole picture before us with a touch."[33]

Illustrations are found so abundantly in poetry that to venture to refer to any of the almost countless numbers were perilous, for the way through that region is "bordered with flowers," and the temptation, if once we entered, might lead us to forsake the true path, and our wanderings would become as devious as were those of Obidah, the son of Abensina. The great prose writers are, many of them, masters of the art of word painting, and their descriptions inpress the mind sometimes even more strongly than the pictures that the painter puts on canvas. For power, the descriptions of the great advocates take the highest rank. Blended with these descriptions are often touches of real feeling and pathos that no heart can resist, and these touches, deftly and delicately given, impart to the descriptions life and power.

The description of persons is a work of art, and the advocate who is a master of this art is, in one respect at least, perfectly equipped. In this work, it is hardly too much to say that Dante excels all other authors. An author, who is himself no mean artist, says of him: "In vividness he is without a rival. He drags back by his tangled locks the unwilling head of some petty traitor of an Italian provincial town, lets the fire glow on the sullen face for a moment, and it sears itself into the memory forever. He shows us an angel glowing with the love of God even amid the glory of heaven, and the holy shape keeps lifelong watch in our fantasy constant as a sentinel." Our author, in praising Dante, supplies an apt example of what he praises in the great Italian; as witness of this we quote: "His suggestions of individuality, too, from attitude or speech, as in Fannta, Sordello, or Pia, give in a hint what is worth acres

[33] Logic (Clarendon Press Series), 157.

of so-called character painting. In straightforward pathos, the single and sufficient thrust of phrase, he has no competitor."[34] George Eliot is a master-hand in this work. A touch here and there, and a person comes into mind, there to remain forever. Poor Amos Barton, in person and in character, is vividly placed before us, with his sniffs, his ungainliness, and his laugh, that, when "he opened his mouth, showed a set of teeth which, like the remnants of the Old Guard, were few in number and much the worse for wear." But the way through the world of fiction, like that through the realm of poetry, is dangerous, and we must turn from it lest we stray into forbidden paths. In the bold, strong portrayal of persons and characters, great advocates have not been wanting in power. Witness Sergeant S. Prentiss' description of Henry Oldham, "the knight-errant of the age, the Don Quixote of the west, the paragon of modern chivalry."[35]

Where the purpose is to praise a witness or party, the effective course is, not to inventory his good qualities, but, by a few words, indirect rather than direct, present his virtues to the jury. Describe his actions, but do not catalogue his virtues. "Select such actions," says Cicero, "as are either of extraordinary greatness or unprecedented novelty, or singular in their kind; for such as are trivial, or common, or ordinary, generally appear to deserve no admiration, or even commendation."[36] This advice needs a little modification, for actions indicating honesty, fairness and intelligence may well be selected for commendation, although they are not uncommon. There are many virtues that commend men, though they are as old as the world, and neither extraordinary nor uncommon.

In censure of a witness or a party a stinging epithet, or a few biting words, are far more potent than a long and labored tirade of abuse. Choate's denunciation of the man from Roxbury,

[34] Lowell, Among My Books (Dante), 120, 121.
[35] Defense of Wilkinson, Great Speeches by Great Lawyers, 109.
[36] Oratory and Orators, Book II, LXXXV.

and of the man "who was not worth the shirt he stood in," and Erskine's denunciation of the witness Lyman, are proof enough of this proposition, if proof be needed. But a caution will not be here amiss. Beware of coarse, brutal invectives; avoid unmerited abuse; never so censure as to make it seem a persecution; be merciful, indeed, charitable to the weak, and never ridicule without just cause. If the weak must be censured, and their errors or their misdeeds exposed, mild language, used with seeming reluctance, if not with real regret, is better than coarse words uttered in anger. The ruffian or the bootblack can use the coarsest epithets, which, to the ignorant, seem the strongest, but the wise regard them as the product of brutal beings with feeble brains. Such epithets, indeed, are evidence of poverty of intellect, and not of wealth.

Events are, as a general rule, to be more fully described than persons or places. In this class of descriptions the particulars must be stated, and by words which clearly mark them. General terms are bad enough in all descriptions, but worse in the description of events than elsewhere.[87] In such descriptions everything deemed an essential part of the picture must be specialized by words of vigor and power. Places may sometimes require to be minutely described, but even where this is so there is quite as much danger of overlaying with details as of omitting some of the particulars. Persons seldom require to be described with particularity, but there are cases, as where the question is one of identity, when this must be done. Even in such cases the description is far more effective if some particular marks or characteristics can be seized and made the principal features of the mental picture.

Special words, not general words, make the best descriptions. It is not to be supposed that, because the vividness of a description depends upon a few bold touches, general or abstract terms are to be employed. The very reverse is true. Simple words which individualize are the words which give vividness. Words that single out the prominent features of the person or the

[87] Quintilian's Inst., Book VIII, Chap. III, § 66.

place described are the words required. Fine words, and many epithets, weaken the picture. Lord Brougham praises the Greeks, censures the Romans, and among the moderns assigns the highest place to Dante, making good his position by illustration and argument.[38] But if the descriptions of Chatham, Erskine, Macaulay, Webster and Prentiss are studied, proof enough of the power of simple words will be found, and the advocate need not to go to the poets or the novelists, although many an advocate would be the better for a study of the great writers of poetry and fiction. Words which individualize the things put into the mental picture make it possible for the hearer's mind to recognize them without conscious effort, and this is the principal object to be attained.

In explanations and descriptions the great advocate often intermixes his most powerful pathetic appeals. There is, however, never parade nor ostentation, but the appeal arises from the work as an incident that inheres in it and is inseparable from it. If the appeal does not spring naturally from the description or explanation, it will not only fail of its purpose, but it will, in most instances, do the speaker great harm. But when the appeal comes—not artificially or in set words—from the explanation or description, as bound up in it and naturally emerging from it, the effect is very great.

Facts well narrated and clearly explained are the great instruments of conviction. "Where the proofs of facts are present, what need is there of words?" asked Chief-Justice Croke in the long ago. The need of words in the narrative is to make it appear that the proofs of facts are present. Work done in making the narrative strongly and clearly present the facts and their proofs will be generously rewarded, for such a narrative is a very important part of the address to the jury. It may be safely said, we believe, that in no other branch of oratory is the

[38] Inaugural Discourse at University of Glasgow, April 6, 1825.

Professor Goodrich gives translations of many of Lord Brougham's quotations, among them that describing the perfidy of Charles of Valois:

"Unarmed he came, save only with the lance
Judas fought with."

narrative so important as in that of the bar. The advocate who presents a dry and uninteresting statement of facts may, by the possible favor of fortune, or because of the invincible strength of his case, or because the opposing advocate is as clumsy as he is, secure a verdict, but it will not be influenced by his address. A narrative well and skilfully constructed will do much to secure the verdict; but a narrative is not skilfully constructed if it be nothing more than a mere rehearsal of the testimony of the witnesses. It requires much more than a simple exercise of memory to construct a good narrative. Facts may be put in many lights. Even things so solid as rocks take different forms and shapes as the sunlight falls upon them. In darkness, rocks are colorless things; in the light of moon or sun they are far otherwise. Facts are much more pliable than the substances of the material world, and he who cannot so light and color them as to make them attractive and useful had better lay aside the robe of the advocate.

A good jury argument has for its foundation a good narrative, and a good narrative is never a dry statement unrelieved by sparkles of oratorical power and destitute of illustration. Illustration and ornament are not out of place in a narrative, although ornament must never be excessive, nor illustration farfetched. "What, then," says Mr. Donovan, "is a good argument? Simply the statement of salient facts in words as simple as Grant used in writing, with ingenious illustrations that bring the point home to the sense and reason of the jury, and rob it of all mystery. It is a clear application of a familiar theme to the one, half obscured in the conflicting stories of a court-room, too often shaded by the interest of plaintiff and defendant."[89] There is much of truth in this statement, but it does not contain "the whole truth, and nothing but the truth." Admirable as far as it goes, it stops short of the whole truth that needs to be laid before the young advocate and suggested to the veteran. Explanation, description and argumentation are elements of every forensic discourse, as well as narration. Principles are to be

[89] 22 Central L. J., 312.

stated and applied, places and things to be described, and events and facts are to be explained; but, as the foundation for all this work, the narrative must be constructed. Simple words are best, but he who thinks that the rule, use simple words, implies a dull, bald style, goes very far astray. The narrative woven of simple words may be full of life and vigor, and may sparkle with the gems and graces of true eloquence.

Among the masters of narrative, John Bunyan may justly be assigned a high place. His words are simple, but their power is great. The narrative of Christian and Faithful's entrance into the town of Vanity Fair, and the events which occurred, is the work of the hand of a master. The advocate, we venture to say, who leaves John Bunyan unstudied, neglects to avail himself of a means of knowledge that a wise man would be sorry to lose. Webster, Prentiss, Erskine, and, indeed, all the great advocates, were strong in the work of narrating facts. Rufus Choate —that comet whose motions no law save that of genius controlled—was, perhaps, less strong in this department of forensic eloquence than elsewhere, but his towering genius supplied what, in a less gifted advocate, would have been an irremediable defect. Doubtless, the work of preparing a convincing narrative—and no other should be thought of—will require time, study and patience, but hard work is the inheritance of the lawyer. His predecessors worked hard, and so must he, or fail. "There is no profession in the whole domain of social life in which real hard work is more essential than in the law. Talent, invention, originality, ingenuity, one or all, will not compensate for the neglect of research, reflection, continuous toil."[40] This is true, not simply, as many suppose, of the acquisition of a knowledge of legal principles, but of every part of a lawyer's work, and in no particular part of it is hard, determined, unceasing toil better compensated than in the preparation of the narrative of the facts.

The chief virtue of a narrative of facts is consistency. This virtue lies at the foundation, for without it the other virtues

[40] 5 Alb. L. J., 392.

are not attainable. Harmony must reign throughout the whole narrative. The theory which binds the facts together must be a consistent one, and each fact as it falls into its place must harmonize with its associated parts, and with the central principle upon which the theory is constructed. Effect must be traced to the cause in the mind of the advocate, and the cause of the effect presented to the jury by the evidence must be made clear to their minds. Cause and effect are the links that bind facts together. Sir George C. Lewis says: "To frame a coherent narrative some theory of causation is necessary." Acts may find cause in motive. Conduct may find its exciting cause in intention or in carelessness. Physical facts never exist without a producing cause. Testimony almost invariably reveals the effects, but seldom reveals the legal cause.

Illustrative cases abound, and for illustration simple cases are often best. Suppose, for example, it is admitted that an accused has struck a fatal blow; death is the effect, and the blow the physical cause, but it is not the cause the advocate seeks. The cause he seeks is that which moved the accused to deal the blow. That cause is to be sought for in the motives, for it may have its existence in some passion, as jealousy, hatred, revenge, or greed. But the cause may not exist in any of the passions, for it may exist in the instinct of self-preservation, and the cause which induced the blow may be that which nature and human laws make just, the right of self-defense. To take another example: A man is killed upon a railroad crossing by the locomotive of the company. There is, we will suppose, no dispute as to the killing, but there may be a dispute as to whether it was caused by the culpable negligence of the company, or by the negligence of the deceased himself. The case will, therefore, turn upon the question of negligence, and negligence must be assumed by the plaintiff to be the cause of the injury. This will be the central principle of his narrative, and to that all other things will be made subsidiary, although many details may be bound up in the story. Take, as an example, a case belonging to a somewhat different class. The defendant, we will suppose, induces the plaintiff by false statements, fraudulently made, to

convey to him his farm. The legal cause of the effect which the plaintiff's counsel will endeavor to make appear, is the fraud, not merely the statements, which are, perhaps, the immediate cause. The ruling principle of the narrative will be the element of fraud, and all the facts will be so gathered and grouped as to make a consistent narrative, pointing from first to last to the fraud of the defendant as the legal cause of the injury.

These examples are sufficient for our present purpose, for that purpose is to prove the importance of connecting, by a clear and consistent narrative, the legal cause with the legal effect. This artificial cause the advocate must discover and place before the jury—not that the natural sequence of cause and effect, of which we shall hereafter speak, is not to be established. That, too, is of great importance. What we here assert, however, is that the main line of the narrative must run from the legal cause to the legal effect. All the paths and all the by-ways of a narrative must tend to one point—the establishment of the legal cause of the legal injury for which redress is sought. As in the olden time "all roads led to Rome," so, upon the one central point must all the ways of a narrative converge.

Coherency and harmony are essential qualities of a well-constructed narrative. A disjointed, rambling story gives no pleasure, and obtains no credit. A story that moves along on a straight line, steadily and coherently, gives pleasure and insures conviction. A governing principle, judiciously selected and rigidly adhered to, secures harmony and coherency. Whatever interferes with the steady and harmonious movement of the narrative impairs its strength. A narrative must constantly move, and move on a settled line. Jurors must be made to feel that they are making real progress, and that they are moving forward on a straight and smooth road.

The governing principle, and the means of making a smooth and certain forward movement, must be provided by the theory of the case. The theory controls the narrative, and a bad theory will yield a bad narrative. There is often a choice of theories, as we have seen, and in making the choice the effect of the theory

upon the narrative should be, it is obvious, fully considered. In the Beecher-Tilton case counsel differed as to the theory of the defense; Mr. Evarts, at the outset, favoring an amiable policy, one taking the ground that all the persons concerned misunderstood each other, while Judge Porter insisted that the theory should be that there was a black-mailing conspiracy,[41] and it is evident that the selection of the theory completely controlled the frame of the narrative.

One great reason why inconsistent theories are evil is, because the existence of such rival theories makes it almost, if not quite, impossible to construct a consistent narrative. An advocate who defends an accused upon the two grounds of self-defense and insanity occupies a very uncomfortable position, for it will be very difficult for him to construct one consistent narrative, and if he cannot do this he is almost sure to suffer an inglorious defeat. So, an advocate who attempts to defend against a promissory note on the two grounds of payment and fraud will find himself involved in very serious difficulty. Truth, it is said, is consistent and incorrigible, and men who seek truth, as jurors generally do, are very apt to discredit any narrative that has in it any material element of inconsistency. This element, wherever it is possible, must be rigorously excluded from the narrative of facts.

It is not so material in matters of pure law to avoid apparently inconsistent theories, although even in those matters there is peril, in inconsistency; but in the treatment of facts, where the great bond of truth is consistency, there is always near and certain danger in inconsistency. It is more prudent, where rival theories are presented, to select one and cling to it with the utmost tenacity than to encounter the hazard of presenting inconsistent ones. This does not imply that there may not be subsidiary hypotheses, but it does imply that these must be in harmony with the central principle which is adopted, for to this principle all parts of the narrative must correspond, so that the case shall be unified, and made to appear as a single, consistent whole. A main line must traverse the entire narrative, but this does not mean

[41] 20 Cent. Law J., 240.

that there shall be no tributary lines branching off in various directions; on the contrary, there will be, in every complex case, diverging lines, but in the end these return to the main line and blend with it.

The ultimate purpose of a narrative in a forensic discussion is to produce conviction. It must be constructed with this purpose constantly in mind. The central principle, therefore, is, as before stated, that of tracing legal effects to legal causes, or, of working from the legal cause to the legal effect, since a legal cause can only be the cause in such a sense as to make the effect a proper subject for judicial decision. Thus, a man's horse may enter on the land of another and injure his trees, and, although the act of the horse may be the actual cause of the injury, the conduct of the owner in wrongfully suffering it to run at large may be the legal cause of the injury. So, to use another illustration, a man may be bitten by a vicious dog, and the direct cause of the injury would be the bite of the dog, but the legal cause would be the keeping of such a dog with knowledge of his vicious propensity. It is obvious, therefore, that, as the principal object of a narrative is to produce conviction, it must be full enough to embrace all the elements of a legal cause. Thus, in the case last supposed, the narrative would be incomplete and insufficient if it omitted the facts which established the knowledge of the defendant.

As the chief purpose of a narrative is to so present the facts that conviction will be produced, it must, it is evident, be so complete that, if uncontradicted, a verdict could be based upon it. Narratives are often faulty in this respect, for they omit elements constituting the legal cause, and, omitting these, do not adequately present a cause for the legal effect asserted. It is also evident from what has been said that it is not always sufficient to trace effects to natural causes, for often much more must be done. But because a narrative must have for its central and ruling principle that of legal cause and legal effect, it by no means follows that the natural laws of cause and effect must go unheeded. A narrative constructed without respect to the laws of natural cause

and effect would, in many cases, fall far short of accomplishing what a really good narrative ought to do. The tracing of effects to natural causes, or working from natural causes to natural effects, is a very important part of the narrative; and if this part of the work be carefully and skilfully done, much strength is added to the narrative, for it contributes greatly to its naturalness and probability.

The work of tracing effects to causes is, in general, more directly that of explanation; but it must blend with the narrative in cases where acts and occurrences constitute its chief elements. Thus, for example, an action is founded on a contract barred by the statute of limitations, and the plaintiff relies upon a new promise, and gives in evidence an oral admission of the defendant. In such a case the narrative of the plaintiff would be much strengthened by subsidiary facts showing why the admission was made. On the other hand, its force might be much weakened by stating subsidiary facts showing that the admission was not made as a new promise, as, for instance, that it was conditional or founded on a mistake. These subsidiary facts may not be expressly stated by any witness, but may be deduced from the circumstances developed by the evidence. There should, therefore, always be a close search into the circumstances for auxiliary facts. Take, for instance, the case of a man stepping from a train wrongfully halted on a trestle work, and falling many feet upon rocks in the bed of the stream crossed by the trestle work. Suppose, further, that, on being approached, he says: "It was my fault, I ought not to have left the train." Unexplained, this declaration would defeat the action, but the vigilant advocate will seek for explanations in the circumstances, and will look beyond the positive testimony. In the case supposed, the explanation may be found in the fact that the fall disordered the mental faculties. This, the acute advocate will infer, caused the plaintiff to make the statement, and that it was not the statement of a sane man, but of one with shattered mental faculties.[42] The assumption that the statement was made because the mental faculties

[42] Terre Haute &c. R. R. Co. v. Buck, 96 Ind. 346.

were disordered, is an inference when made after the facts are developed, but when made before the development of the facts it is an invention. This process, that of rhetorical invention, is quite as important in the work of preparing and presenting the narrative as in that of preparing and presenting the arguments. It is, in fact, substantially the same as constructing an hypothesis and adducing facts to sustain it.

Rhetorical invention is essential in preparing and presenting a narrative of facts, for the reason that the evidence seldom does more than directly present the bare facts. Thus, that a man made an oral admission is often proved by positive testimony as a fact, but the immediate cause which induced him to make it is almost always a matter of pure conjecture. The advocate who proceeds philosophically will invent or suppose a cause, and, by development, make good his invention. But this he cannot do unless there are probable grounds for his conjecture, and these, in most cases, are to be found in the minor facts and circumstances of the case. The bare facts positively stated by the witnesses are like the trees in a wood; they stand out and are plainly seen, but, to ascertain what supports them, the search must be made at their roots. So it is with facts; their roots must be searched for, and their abiding and supporting places revealed. These are found in the circumstances—in the soil; for, to facts, circumstances are as the soil to trees and bushes. Positive testimony does not create the circumstances. The incidents of almost every occurrence are created by indirect agencies, and are gathered and presented by a process of inference, rather than by positive testimony. Preceding this inference is the invention, which, when it takes form, is an hypothesis. First, then, is the invention; next, its molding into form; and last, its development by means of the facts and circumstances. It is, therefore, quite clear that the advocate who prepares a narrative without searching the circumstances leaves much undone that should be done.

Rhetorical invention is not a corrupt process. A man of the purest integrity may call it to his aid without staining the purity of his character. It does not mean the fabrication of facts, nor

does it imply a departure from truth. An advocate who fabricates facts dishonors his profession and injures his client. A man that cannot grapple with facts without resorting to falsehood has no place in the forum. Falsehood, express or implied, stains the character of an advocate, and puts his cause in peril. In advocacy, falsehood is a fault injuring both advocate and client, and it is the sheerest folly to resort to it. But there is neither wrong nor folly in inventing assumptions that present facts in a clearer and truer light. One who does not look beyond the mere words of a witness is apt to be deceived; he, at all events, puts aside one of the great instruments of eliciting and exhibiting truth. Nor does one who seeks information and assistance from circumstances wander from the evidence, for circumstances are evidence; not unerring or infallible, to be sure, but, for that matter, neither is any species of evidence. All human testimony is fallible, not so much because men are corrupt, but because human faculties are imperfect. Of the two species of evidence, that of circumstances is, indeed, the most certain; for circumstances cannot be readily created, but positive testimony may be manufactured. Nor is this all. Mistakes more often spring from the actions of men than errors from circumstances; for the one depends upon the direct acts of men, while the other is a combination indirectly formed out of many acts and occurrences. The English chief-justice was right when he said that "Circumstantial evidence is frequently more unerring and satisfactory than direct proof."

The advocate who goes to the circumstances for the purpose of getting the truth goes to a sure place, and if he makes right use of what he gets there, he will aid the cause of justice. Nor is it the great or conspicuous circumstances that best supply the grounds for invention or conjecture; on the contrary, it is often the little, obscure circumstances that supply the strongest evidence. Conspicuous circumstances may sometimes be created, but the details, the obscure things among the great, are found there because falsehood cannot expel them. If one could distinctly and clearly see every little circumstance, few cases of wrong or fraud would pass undetected; and although one may not always be able

to perceive them, it is his duty, at least, to make search for them. But in this search, as in all others of like nature, it must not be forgotten that falsehood assumes, as near as it can, the garb of truth; for, as Lord Westbury said, "Truth and falsehood are not always opposed to each other, like black and white."[48] We must, therefore, expect to encounter, in our exploration of circumstances, more of resemblance than of direct opposition. Falsehood pays the same compliment to truth that hypocrisy does to religion; it attempts to imitate it.

The groundwork of invention must be truth and experience. A conjecture or an invention without the support of truth or experience is not only valueless, but harmful. A wild conjecture, or an entirely unsupported one, gives to the whole narrative an appearance that not only repels belief, but causes the mind to believe its opposite. If, for example, the invention assumes that a man made the declaration while mentally deranged, and the facts and circumstances lend no support to the assumption, the almost irresistible inference would be that the admission was made because it was true. In the absence of explanatory circumstances this is, indeed, the natural inference; but the failure of an attempted explanation intensifies the force of this inference, so that one who invents a cause or an explanation must take heed lest his invention make the matter worse.

In the eagerness to invent a plurality of causes, counsel often overreach themselves; not often, indeed, through bad motives, but through crude and hasty assumptions resulting from error. Cases have occurred where admissions testified to by a bad witness have been made strong, which else were weak, by counsel, who, in their over-anxiety to multiply reasons and place the matter beyond doubt, have attempted to account for the admission by an invention having no foundation in the facts or circumstances. As a matter of policy, to place it on no higher grounds, it is best never to put forward an invention destitute of support from the evidence. No invention is worth presenting unless it is founded on

[48] Daniel v. Metropolitan R. Co., 6 L. Rep. 644, C. P.

fact, or is well supported by the circumstances, however ingenious it may be.

Rhetorical invention in advocacy is much restricted, since the advocate is not at liberty to gather all his materials where he will, but must gather the great body of them from the evidence. But while his invention is thus limited, it is by no means imprisoned in a close cell. Illustrations, examples and ornaments he may gather from other sources. Conjecture may supply explanations, hypothesis may supply missing links, imagination may spread the color of probability, and ingenuity that of plausibility. In no just sense is the advocate confined to the bare, uncolored facts that stand out from the testimony. Materials may be gathered from many sources, and used to make the truth clearer, and to bind the facts together in a coherent structure. Fiction is to be rigorously excluded; but fiction is not all of invention, nor, indeed, in a forensic discourse, any part of it. In plain business cases invention is an instrument in the elucidation and exhibition of truth; in obscure cases it is a most potent instrument. An action is brought, let it be supposed, for the breach of a verbal contract for the sale of a horse; let it be further supposed that there is a contradiction among the witnesses. Even in such a case, plain and familiar as it is, there will be use for invention, for the powers of counsel will be set to work to conjecture and state reasons why the witnesses of the one side should be believed rather than those of the other. Motives, knowledge, opportunity and like matters will be searched, and explanations invented and incorporated in the narrative.

The greater the obscurity that clouds a case the more important is the work of inventing materials to give strength and coherency to the narrative the advocate puts forward as the true one. Thus, for example, suppose a man executes a will disinheriting children whom he had loved all his life, and there is no direct testimony as to why he turned from a course that through his whole life he had pursued. The advocate employed to overthrow the will would, in such a case, find before him a wide field for invention. If there was no evidence tending to show undue

influence, he would naturally assume that the testator was insane. Invention would be put to work upon minute acts of the man's later life to discover and present to the jury other evidences of mental disorder than that supplied by the will itself. Acts would be traced to their causes, or causes invented, and all would be woven into the narrative, and made subordinate to its governing principle by showing the causes to be inadequate to produce the acts.

The advocate who supports the will, in such a case as we have imagined, would naturally invent causes sufficient to account for and explain the acts asserted to be without cause or motive. It is evident, therefore, that it is a mistake to assume, as many do, that all the merit a narrative can possess is to set forth the facts in regular order and clear succession; for a narrative may be orderly, and fact follow fact in due succession, and yet, interwoven with these facts, there may be proofs that bind them closer and present them stronger, although these proofs may be, in a great degree, inventions. But inventions that arise to the dignity of proofs must be more than mere imagined things, for in them must always be the element of truth, and that element the facts and circumstances must be made to supply. Evidence must be made tributary to the inventive process, not by perversion or by corrupt practices, but by fair and just mental processes. One story is good until another is told. To most cases there are two sides, and it must be owned that skill may sometimes make the worse seem the better; but no mere bald fabrication by the advocate can accomplish this result. One of the British kings undertook to play the judge for a time, and, as he said, he could easily decide where he heard only one advocate, but where he heard two he could not decide, even though in many cases the principal facts were undisputed, and the whole contest was as to what weight should be assigned to them. The plausible inventions of opposing counsel so changed the form and posture of the facts that, as he declared, "he knew not where the right truth lay."

"What is invention," writes Dr. Whewell, "except the talent of rapidly calling before us many possibilities, and selecting the

appropriate one? It is true that, when we have rejected all the inadmissible suppositions, they are quickly forgotten by most persons, and few think it necessary to dwell on these discarded hypotheses, and on the process by which they were condemned. But all who discover truth must have reasoned upon many errors to obtain each; every accepted doctrine must have been one selected out of many candidates. In making many conjectures, which on trial proved erroneous, Kepler was no more fanciful or unphilosophical than other discoverers have been. Discovery is not a cautious or rigorous process in the sense of abstaining from such suppositions. But there are great differences in different cases in the facility with which guesses are proved to be errors, and in the care and attention with which the error and the proof are afterward dealt on."[44] This, although written of the work of investigators in the inductive sciences, applies to the work of the advocate, although not, of course, in its full extent. The advocate is engaged in the work of discovery, inasmuch as he is engaged in bringing to light things not seen. He invents hypotheses for the purpose of discovering the truth, just as the philosopher does, although his work is much less extensive and much less important. He must try conjecture after conjecture, rejecting those that cannot be proved and accepting those that stand the test. His exploration of the facts will accomplish little if he looks no further than to those which assume a distinct and positive form. Those can be seen by the jurors as well as by the advocate, so that, to draw from the facts all that is really valuable, he must conjecture what causes produced many of the effects, and what effects have followed from the causes stated by the witnesses. The advocate's work, while of a much less pretentious character than that of the philosopher, is of a kindred nature, and the rules which govern it are very similar to those which goven that of the philosopher.

The advocate must invent the forms in which the materials out of which he constructs his narrative are presented to those

[44] History of the Inductive Sciences, Vol. I, p. 291.

whom he undertakes to convince and persuade. The materials come to his hands crude and rough; they must leave them molded and fashioned into complete and attractive forms. As the artisan who takes a rough and jagged piece of metal, and by blows, strong and skillful, that make the "sounding anvils ring and the steely sparkles fly," fashions it into a beautiful and useful implement, so must the advocate fashion the facts which the evidence brings to him. Polish must be given the rough facts, brilliancy must be rubbed out of the dull ones, and life instilled into the dry ones. The friction which, earnest, determined study produces will do this, but nothing else will surely do it. An unrelenting and stern comparison, a rubbing together of the facts, as one rubs his benumbed hands on a cold day, will impart warmth and vigor, sending a current like that of electricity all along the line of the narrative. Comparison with matters presented by experience, as well as comparison with the facts which emerge from the evidence, must be made. The search for like circumstances should be wide and vigilant. Unlike circumstances, too, should be gathered, and compared with those presented by the evidence. Over a broad field the inventive powers must plow, not merely skim, but plow deep, for beneath the surface may be found the things most needed. Wide as the field is, it is, nevertheless, inclosed, for the field is the field of experience. Imagination will not present the forms and illustrations that go to men's hearts and minds in a real controversy unless it is kept within the bounds experience prescribes. He who wanders outside of this field may delight the fancy, but conviction his address will not bring. But keeping within the lines of experience, and within the sweep of the evidence, invention may be employed with sure hope of abundant profit in every complex case. The charm of Prescott's narratives all will own, and yet he narrated only the same facts related by others who charmed us not at all. Macauley arouses us almost to enthusiasm in narrating the same facts as others who barely arouse attention. Sir Vicary Gibbs, a really great man, narrated the same facts as Erskine in one case, and yet, although the narrative of the

former was forcible and clear, that of the latter, while equally forcible and clear, glows with the warmth and vigor of life that gives it a power and charm almost irresistible.

Probability is an essential element of every narrative constructed for the purpose of convincing or persuading men to give judgment in favor of one party and against another. "You must be attentive," says John Quincy Adams, "to give your narrative that natural air of truth which forms the first excellence of dramatic composition." A narrative destitute of probability seldom pleases, and never convinces. A narrative that lacks probability will never move a jury, for what does not possess probability seems at variance with truth, and jurors seek truth. A narrative is probable when it is made to appear to be true. The first step is to bring it into correspondence with the experience of the jury, for what corresponds with their experience they accept as true, but what opposes it they reject as false. Dr. Campbell says, with truth and force, that, "Hence it is, that when a number of ideas relating to any fact or event are successfully introduced into my mind by a speaker, if the train he deduceth coincide with the general current of my experience; if in nothing it thwart these conclusions and anticipations which are become habitual to me, my mind accompanies him with facility, glides along from one idea to another, and admits the whole with pleasure. If, on the contrary, the train he introduceth run counter to the current of my experience, if in many things it shock those conclusions and anticipations which are become habitual to me, my mind attends him with difficulty, suffers a sort of violence in passing from one idea to another, and rejects the whole with disdain."[45]

Jurors are quick to pronounce natural and credible narratives which correspond with their experience, and prompt to reject those which run counter to it. It is, therefore, important that the advocate should have an accurate conception of the experience of the jurors, since, without this knowledge, he cannot

[45] Philosophy of Rhetoric, 88. See also, Robinson's Forensic Oratory, § 316.

judge what they will regard as natural and credible. "The consummation of eloquence," says John Quincy Adams, "is the adaption of ideas in the speech to the ideas already in the minds of the hearers." This well-known principle, when analyzed and traced to its foundation, will be found to be, in the main, the power of putting before men that which their experience receives with favor. We have already referred to great advocates who seemed to make jurors of themselves, and this they did, chiefly, by justly measuring the experience of the jurors, and placing before their minds that which their experience approved.[46] Of a very able advocate it is written: "He spoke directly to the judgments of those whose convictions he was to gain, putting his mind into contact with theirs, on an equality of condition, without assuming the superiority that is implied in efforts to mislead through the ignorance, the failings, or the peculiarities of men."[47] This was the course O'Connell and Curran so successfully pursued with Irish juries, and that Abinger and Erskine pursued with English juries. Webster, himself a notable type of sturdy New England sense, brought the dominant ideas of his speeches within the experience of the New England jurors, who were men of solid sense and keen sagacity, and were influenced by strong and massive arguments rather than by pleasing figures of speech; and Prentiss, born and reared in Maine, brought his own ideas into close correspondence with those in the minds of the jurors of Mississippi, for he, like all great advocates, took

[46] "It was a custom of mine," says Montagu Williams, "to try and make sure of two or three of the most likely men first, and then devote my attention to the others. Sometimes one man in particular would prevent special difficulties. * * * There was nothing for it but to patiently hammer away. I found it was half the battle to rouse him from his indifference and to thoroughly arrest his attention. It was sometimes my experience, too, that when it came to considering the verdict, one or two strong men would easily carry their fellow jurors along with them." Reminiscences of Montagu Williams, Vol. I, page 154. Mr. Whipple in his Recollections of Eminent Men, 7, 9, also tells how Rufus Choate hammered away until he finally convinced the obstinate foreman of a jury. "Keep your eye on the jurymen," says Crispe.

[47] Life of Benjamin R. Curtis, 84.

pains to understand the men whom he sought to convince and persuade.[48]

Jurors, for the most part, are not wanting in intelligence, but they are not, as a general rule, persons of wide experience. Their lives are bounded by narrow limits, for they do not meet men in the great affairs of life. Nor are their minds trained and disciplined by habits of thought and study on many or great concerns, for, in general, their lives run along a level, and they think only of things that come before them in the ordinary affairs of life. In the contests of the forum new things are brought before their minds; acts, events, conduct and transactions take forms and shapes strange to them and foreign to their methods of thought. What is strange and new generally wears the guise of improbability, although not always, by any means, is this true. It is in making new things and things that assume strange forms correspond with things already in the minds of the jurors that skill in advocacy in a great part consists. The power to make new things resemble things familiar to the minds of the jurors is to the advocate much as the power of perceiving and reproducing real things is to the painter. To take up a new thing or a thing in a strange form or garb, and put it in a familiar form and apparel, and lay it by the side of things known to the jurors as true things, is a great power in narrative and explanation. An advocate who can make a new or strange thing seem like the familiar things of which jurors have knowledge from experience possesses one of the great powers of forensic oratory; but this power he can not have unless he possesses, also, a far and keen insight into the knowledge which jurors acquire by experience, and is able to make his own ideas con-

[48] The speech of Prentiss in the Wilkinson case, as given in Snyder's Great Speeches by Great Lawyers, and in Carleton on Homicide, also illustrates the text. While that address is too florid, rhetorical and exaggerated to serve as a perfect model in some communities, yet it is unsurpassed of its kind and is well worth study as showing how adroitly and effectively an orator may appeal to the tastes, prejudices or chivalry of some juries. It is also a good example of an effective treatment of evidence and the credibility of witnesses.

form to those which experience has laid up in their minds. As the painter makes a portrait resemble the sitter, so must the advocate make the ideas he presents resemble those that dwell in the minds of the jurors. He does not wield the brush of a painter of ideal pictures, but his brush is essentially that of the portrait painter. His materials are facts, but his colors are plausibility and probability. Plausibility and probability give color to narratives, and make them instruments of conviction if the colors are laid on with skill. The reason that plausibility and probability do make narratives powerful as instruments of conviction is because they make them seem the truth, and they make them seem the truth when they make them correspond to ideas already in the minds of the jury.

Experience does not mean actual observation and trial, nor is its meaning confined to what has occurred within a person's own knowledge.[49] If knowledge derived from experience were confined to matters ascertained by actual observation and trial, it would be so narrow that its practical value would be very small. The term has a much wider sweep, for it means what men lay up in their minds by thought and observation.[50] This process unites the results of thought with the products of observation. Associated things are bound up in the mind, not simply because actual observation has proved their kinship, but because the reasoning powers affirm that like produces like, and that things that possess common qualities, or, in logical language, a community of identical marks, are essentially the same things. If, therefore, the advocate can first sound the depth and measure the breadth of the experience of the triers of his cause, and then present ideas bearing the same marks as those recognized by the triers to be true, he will both convince and persuade them. If he can prove the kinship of the ideas he presents with those accepted as true, his narrative will be sealed with approval, because it will be both plausible and probable.

[49] *Ante*, 110.

[50] Whately's Elements of Logic, Appendix V; Campbell's Philosophy of Rhetoric, Book I, Chap. V.

Experience teaches jurors that men of like nature under like circumstances act in like manner. Thus, if a defendant be asked if he executed a deed, and answers, yes, jurors, guided by experience, will give it as their judgment that he said yes because it was true that he did execute the deed. It is scarcely too much to say that the first great rule to be observed by one who desires to construct a probable and plausible narrative is to make it seem that the persons who performed the acts under consideration did what persons of like nature would have done under like circumstances. The conclusion of the whole matter is that the narrative must make it seem that the persons whose acts are involved did what it was to be expected they would naturally do in the particular instance. If the act is unnatural, it is improbable; if natural, it is probable. Thus, if a man is the bitter enemy of another, and has entered the house of the man he hates, and there an altercation arises in which the hated man is slain, then, in the absence of explanatory evidence, the probability is that the enemy slew the man he hated. To illustrate by another example: A stranger is found in the house of a man recently murdered; the probability is that the stranger is the murderer. Again, a wife is slain; the husband is with her in their home at the time; nothing is known of any ill-will or quarrel between them, and no one can give any explanation of the homicide; here there is no probability that the husbad committed the murder, since he was where it was his duty to be, and no motive is shown which makes it likely that he was the guilty person. It is evident, therefore, that the elements of probability are to be searched for in the motives of the actors and in the circumstances of the transaction. The basis of the process is the assumption that human beings act naturally, that is, as persons of like nature would act under like circumstances. Going deeper, and to the foundation of this assumption, it will be found that men act naturally when they do what most men would do had they occupied a like position.

If the persons whose conduct is under discussion have not acted as persons would naturally act under like circumstances,

then some sufficient reason must be adduced for the departure from this great rule of human conduct. It may, for this reason, be necessary to exhibit the mental condition of the persons whose acts are the subject of comment. Thus, a man overcome by fear may do an act which a courageous man would not do. A man frightened by an accusation may, through fear, do some act evidencing guilt. A child of tender years may do what an older person would not naturally do under like circumstances. A feeble-minded or a drunken man may be drawn into a contract that a man in possession of his mental faculties would not sign. A man with mind and will diseased may kill or injure another in a case where a sound-minded man would not lift a finger to do the other harm.

Men's acts, seemingly unnatural, may be made to appear natural by a just exhibition of attendant or antecedent circumstances. Men may make admissions through mistake. Men may be deceived by appearances, for men have jumped from moving trains and coaches when, but for appearances, it would not have been natural for them to do so. Men deceived by appearances have slain men. But our examples need not be multiplied, for enough is done when it is suggested that, where an act seems unnatural, that is, out of the ordinary line of action that men pursue, the means of making it seem natural must be found, no matter how severe the labor it may cost; and they may often be found in the character, disposition or motives of the actor, or in the attendant or antecedent circumstances. If the act is eccentric, there must be something peculiar in the doer to make it appear natural to him, for what is unnatural with some persons may be natural with others. If the act is an unusual one, something must be found in the circumstances which influenced it to make it seem natural. "Natural" is, after all, in a great degree, a relative term, for things may be natural under peculiar circumstances that would ordinarily be unnatural. Search, continued and deep, must be made for the elements that give an air of naturalness to the conduct of men who move as figures in the narrative, and these elements must

be so deftly woven into the fabric that it shall seem that they are there, not by the cunning or skill of the advocate, but because they naturally belong there. Philosophers in the domain of physical science assume that there are great laws of nature operating silently and uniformly on all things within their wide sweep, and so must the advocate assume that there is a great law of human conduct, and, by making facts, events and acts conform to this law, impress upon them the seal of naturalness. for naturalness is the mother of belief.

Events are probable when an adequate cause can be assigned for them, for there is between every event and that which produces it the relation of cause and effect. No event occurs without a cause; nor is it sufficient for one who asserts that an event did happen to adduce a cause supporting some event, but he must adduce a cause accounting for the particular event. It is here that fallacies often confuse and mislead. A cause for an event of a character similar to that in issue is brought forward and adroitly made to seem the cause of the event which is in dispute, whereas, in fact, it is only a cause sufficient to account for a resembling event. Thus, death from some diseases resembles death from poison, and an advocate proves the symptoms present in death from disease, and, omitting the differences, gathers up the resemblances and affirms that the death is accounted for by attributing it to disease. Success in establishing the probability of events depends on tracing them to causes which seem naturally to produce them. The closer the relation and the more natural the connection between an event and its cause, the more certain it is that belief in the assertion that the event did happen will be engendered. Men who perceive a cause and its relation to an event will believe or disbelieve as they judge of the adequacy of the cause and its relation to the event.

It is sometimes necessary to go back of what, at a careless glance, one might regard as an apparent cause, and ascertain the real cause. It is not always that the real cause is ascertained by looking to the direct cause alone, for there is often a plurality

of causes, and the true relation can only be ascertained by uniting these causes, or, rather, these various elements of a cause. These elements, when united, must be placed in such a position that the event will seem to be the natural effect. By establishing and maintaining the relation between events and causes a narrative is unified and invested with the appearance of probability.

Ingenuity in making a narrative plausible and probable is talent well employed. The great influence of probability will readily be granted by one who reads the essays upon the question of the authorship of the letters of Junius. If the essay of one who skilfully uses the circumstances in favor of the claim of some person other than Sir Philip Francis is read, and none other is read, conviction is almost sure to result; but if opposing essays are read, the claim of Francis is quite sure to be accepted. In the now famous controversy as to who wrote what most men believe are the plays of William Shakespeare, probability is so skillfully employed that one who does not read both sides is apt to go astray.[51] Even the claim made for Lord Bacon is given a show of strength by a skilful use of probability.[52] But no one doubts the power of probability, although many err in searching for the means of creating it. Great things are only looked into, while probability generally dwells in little things. Advocates, too careless to make a thorough search, or else without analytical power great enough to prosecute it effectively, often leave untouched materials that a better workman would surely find and skillfully employ. If there were such a thing as a mental microscope, an advocate would find use for it in searching for the elements of probability; but artificial aids he cannot get, and nature's powers must be taxed to the utmost where the case is close and the contest fierce. Plato says: "In courts of law men care nothing about truth, but only about conviction; and this is based on probability, to which he who would be a skillful orator should, therefore, give his whole attention."[53] He sums up the

[51] The Shakespearian Myth, 255.

[52] Shakespeare in Fact and in Criticism, 16.

[53] Phædrus, I, 578. In a practical science such as jurisprudence proba-

whole matter by affirming that "The observance of this principle throughout a speech furnishes the whole art." Plato, who "reasoneth well," is not far wrong in this, although his censure of courts and advocates, even if just in his own day, is not entirely so in ours. Philosophers may dream of finding absolute truth, or of proving things with the certainty of demonstration; but outside of the field of speculation, and in the ordinary affairs of social and business life, men have always acted upon probability, and so they must act until the end of time, unless mortal minds are invested with almost omnipotent power, or things are made unalterably certain, and so marked that men can unerringly see them as they are, and not merely as they appear.

A narrative should appear to be a statement of facts, and this, in the main, it must be. It must in form be an account of the facts with attendant explanations and descriptions. If, by thrusting in arguments and appeals, its character as a narrative of acts and events is destroyed, harm is done. It must seem to be and must chiefly be, a vehicle for conveying facts to the minds of the jury. This appearance it must not lose, for, if it should, suspicion will be excited and little credit given to it. If once the jury perceive that under the guise of stating facts to them the advocate is really addressing arguments and appeals to them, the narrative will fail to accomplish its purpose. But an argument may be suggested, not developed, as the narrative proceeds, and if the suggestion be cleverly put it will arouse the jurors, and the developed argument to which the suggestion leads will seem to be their own discovery, and they will cling to it with far more tenacity than if they supposed it was the work of the advocate and not their own. Suggestions adroitly dropped by the way will yield good fruit.

The central principle adopted as the line on which the narrative shall travel will supply the test for determining whether the facts shall be narrated in chronological order or in some other method. Mr. Cox says: "The first care is to observe, as nearly

bility must, of necessity, rule the decisions of courts and juries. City of Terre Haute v. Hudnut, 112 Ind. 542, 556, 13 N. E. 686.

as possible, the order of time in detailing the events." We cannot fully acquiesce in this statement, for we think the first care is to survey and lay out a line that, if followed, will make the narrative an effective instrument for producing conviction. This is the paramount rule, and effect is best given it by so narrating the facts that they will surely establish the ultimate conclusion that constitutes the legal cause. If the only object is to bring together a collection of facts, then, doubtless, the chronological order is the one always to be adopted; but where the object is to produce conviction, then the chronological order is to be adopted only when it will best promote the object. It is probably true that, as a general rule, the chronological order is the best, but there are many cases where it is by far better not to adopt that method. It never should be adopted where it will place controlling facts in an obscure position, nor where it will give undue prominence to unimportant ones. Facts that most strongly tend to prove the desired ultimate conclusion must be given the most conspicuous positions, even at the expense of a departure from the strict order of events. The eye should be fixed on that conclusion, and the road built directly to it.

It is useless to attempt to frame a narrative without first fixing resolutely upon the object to be attained and the point to be reached. The narrative in the argument to the jury differs in this respect from the preparatory or opening statement, since the great object of that statement is to forcibly and clearly inform the jury what they are to try, while the narrative in the argument, although primarily the vehicle of information, is, nevertheless, an effective instrument of conviction. The order which will augment its power as a means of producing conviction is always the best. It is, therefore, the true rule to adopt such a method as will give to a narrative its full strength, and not hamper it by confining it to the order of time. In many cases advocates have commenced at the last important act, and moved backward through the cause. Historians very often depart from the chronological order. Thus, to mention one instance that comes to mind, Helps departs from the chronological order in his History of American Discoveries because, as he says, he

was convinced that to enable the reader to "remember any of the entangled history, it must be told to him according to place, and not to date."

It is better to adhere to the line resolved upon than to depart from it, even if it be a bad one. It is safer to travel on one road than to attempt to travel on many, even though the chosen road be not the smoothest and best that might have been selected. A vacillating and wavering movement gives the narrative a feeble appearance, but a movement with bold and steady strides adds strength. On a well chosen line, clearly defined by a careful survey, one may move with ease and confidence; not so on a line that lies over rough ways, and turns and twists in divers directions; still, one may better go forward by keeping on the one road than by changing from road to road. The cardinal rule, therefore, is to adhere closely to the order adopted throughout the entire narrative. A mistake in designing the method is intensified in its hurtfulness by wavering, but its evil results may be somewhat diminished by adhering to it as closely as practicable. One who keeps to a certain line, even though it be a twisted line, is less apt to get lost than one who wanders from line to line.

Facts must be grouped under appropriate subdivisions, each group having a well-defined basis for its support, but all the groups constituting, when gathered together, a complete and consistent whole. In no other method can facts be effectively dealt with in the narrative. Place may be the basis of one group, and on that foundation should be arranged the relevant facts adequately described and clearly explained. An event may be the basis of another group, and on that basis the facts connected with the event, together with the explanations and illustrations that are required to exhibit them distinctly, should be clustered in orderly array. Conduct may form the basis of another group, and in that group should be placed all the relevant and material declarations and acts of the person whose conduct is the subject of discussion. So, throughout the whole narrative, should the parts that relate to distinct things be separated

into appropriate groups, but yet all these groups must be held together by one central principle. The relations between the different groups must be natural, and so exhibited as to be clearly perceived. The groups are not to be allowed to take position as isolated and detached wholes, complete each in itself, but as members of one consistent and harmonious whole.

Forensic narratives have much to do with real men and real women. In the forum, as in the novel, fictitious characters are given the principal persons who appear as parties or witnesses. Virtues will be often unduly praised by the one side, and unjustly denied or decried by the other. Faults will be magnified by the one contestant and concealed by the other. Rare dramatic power is often exercised in presenting the characters and conduct of parties and witnesses. Each person who exerts an important influence on the cause must be assigned the high position his virtues merit or the base one his vices demand. No person should ever be placed in a false position. No benefit will result from such a course, and no honorable advocate will pursue it. Persons whose conduct or acts only slightly affect the case should have but slender attention in the narrative. A narrative overcrowded with persons divides and distracts the attention of the jurors, and it is better to leave some unnoticed than to bring too many into view. Much as in a novel or a drama, the interest of a forensic controversy centers upon a few persons; minor characters fill the subordinate places, attracting but little attention, while the important persons fill the chief places and absorb the attention of the listeners. If the advocate knows his work, he will not crowd his narrative with persons who occupy insignificant positions in the story he lays before the jury.

In presenting the persons who take places in the narrative, each must be assigned position in the appropriate group. If it be necessary to praise or condemn, the work should be done when the advocate comes to the person to be praised or condemned in the appropriate group, and he should not wander out of the line for the sole purpose of praising or condemning a party or a witness. Each person meriting praise or deserving

censure is necessarily connected with some fact or event, and when that fact or event is reached then is the proper time to take up the person whose character is to be discussed. It should not be taken up as an isolated or detached part of the narrative. This is the general rule, but there are exceptions; for there are cases where the main assault should be made upon the parties or some of the witnesses, and when this is so, it is better, perhaps, to make the assault a complete and independent part of the discourse. When this course is resolved upon, the assault must be powerful and determined, for an unsuccessful attack upon a party or a witness recoils, with great force, upon the assailant. If the advocate is not entirely sure that he can make his attack completely successful, he should not make it as an independent part of his address, but should make it as a dependent part of the explanation or description of an event in which the person assailed occupies a conspicuous position; for, if thus made, it will not appear that the whole force of the advocate has been brought to the assault, and in case of failure the assailant's discomfiture will not appear to be so complete or disastrous.

Cases are controlled by a few points. Everything depends upon strongly grasping and steadfastly holding these leading points, and much depends upon the method in which they are arrayed and presented to the jury. The advocate who does not grasp the points of his case, or who loosens his hold on them, will do his client beggarly service; nor will he really do effective work unless he lodges the points strongly and clearly in the minds of the jurors. While it is clear that few points control cases, yet it is not always easy to determine how many points shall be made. What may seem a strong point to one juror may not seem so to another. The advocate himself may mistake the strong points of his case, and seize the weak ones instead of the strong.[54]

[54] "I remember," says Pliny, "when Regulus and I were concerned together in a cause, he said to me, 'You seem to think it necessary to dwell upon every single circumstance, whereas, I always take aim at my adversary's throat, and there I closely press him.' 'Tis true, he tenaciously holds

As a general rule, however, better too few than too many points, provided the few are really strong. A few strong points, enforced by forcible and repeated strokes until they are deeply impressed upon the minds of the jury, are infinitely better than man weak ones, or, indeed, than many of any kind feebly presented. The great advocates generally make few points, but make them with a power that so impresses them upon the minds of the jurors that they cannot be dislodged.[55] It is, nevertheless, possible to err in depending upon too few points as well as in making too many. The reason for affirming that there is danger of making too few points is the one we have suggested—the possibility of the advocate himself making a mistake, and the fact that what will impress one juror may not reach another. This last reason merits attention. Montaigne was not far wrong when he said, "And there never was in the world two opinions alike, no more than two hairs or two grains. The most universal quality is diversity. Never did two men make the same judgment of the same thing." Twelve men may be expected to be diverse in many things, and provision will be made by one who knows his duty and his jury for this diversity; but it seldoms happens, if, indeed, it ever does, that there are twelve independent minds in the jury box, for, in most instances, there will be some master minds which merge the others. In by far the greater number of cases, however, there will be diverse

whatever part he has fixed upon; but the misfortune is, he is extremely apt to mistake the right place. I answered it might possibly happen that what he called the throat was, in reality, some less vital part. As for myself, said I, who do not pretend to direct my aim with so much certainty, I attack every part, and push at every opening; in short, to use a vulgar proverb, I leave no stone unturned." Ram on Facts, 264n.

[55] Judge Joseph G. Baldwin says of S. S. Prentiss: "He avoided, too, the miserable error into which so many lawyers fall—of making every possible point in a case and pressing all with equal force and confidence, thereby prejudicing the mind of the court and making the jury believe that the trial of a cause is but running a jockey race." See also, Lord Brougham's criticism of Lord Eldon, Historical Sketches (2d series), 66; Wirt's description of Chief Justice Marshall; Flander's Lives of Chief Justices, 307; Ibid, 65.

minds to be influenced, and it is the part of prudence to make available every means at command to influence each juror. It is prudent to do this for the reason, if for no other, that it is not always possible to determine who will be the controlling members of the panel. An obstinate and dull man, if once thoroughly aroused and convinced, is likely to exert as much influence as a much more intelligent man.

Judicious repetition strengthens the address to the jury; immoderate repetition weakens it. An argument repeated in a different form will command attention; repeated in the same form it will weary. Repetition is an element of strength when rightly used, but an element of weakness when abused. Tire a juror by useless repetition, and he will yield grudgingly if he yields at all. But repetition is necessary to impress an argument upon the minds of the jurors, for few men, not trained by study and habit, fully grasp a point once stated; to give it full force it must be repeated. The secret of successful repetition is to repeat in a different form of words; the later briefer and stronger than the earlier. A thought repeated in different words seems a new thought.[56] Burke excelled in the art—for it is an art—of repetition. A long statement first, then a short, clinching repetition. Fox, as is well known, placed a high value on repetition, declaring that "to the multitude one argument stated in five different forms is, in general, held equal to five new arguments."[57] Possibly, an orator like Fox might make one argument appear equal to five, but if he could, few other men can, and the prudent advocate, speaking under hostile eyes, will not attempt it, although he will repeat an argument so that it shall be a sufficient time before the minds of the jurors to enable them to seize it. Better a little halt for repetition than that an argument be lost in the rapidity of the movement. As well beat the air as state points that the jury do not get into their minds. But

[56] "A thought is often original although you have uttered it a hundred times. It has come to you by a new route, and by an express train of associations."—*The Autocrat of the Breakfast Table*, 8.

[57] Stanhope's Life of Pitt, Vol. 1, p. 247.

constant hammering is not needed. One clear statement, with a short, bright, striking repetition, is enough.[58]

Refutation must overthrow the position against which it is directed, but it need do no more. It is, for this reason, sometimes expedient to mark out what it is proposed to refute before entering upon the work. In other cases it is safer to enter upon the work without distinctly marking out what point it is the purpose of the argument to overthrow. Where the argument will completely accomplish all it professes to do, it is better to clearly indicate what will be answered; but where there is doubt on this point it is safer not to indicate just what it is proposed to answer. It is seldom prudent to attack in a general way, since there is danger of making only a partial refutation, and a partial refutation where a general one is attempted is almost always hurtful. The prudent course is to determine against what particular point the attack shall be directed, and concentrate upon that point all the forces at command.

It is not every position that should be assailed. It is useless to spend time in answering arguments or refuting propositions that neither weaken the client's cause nor strengthen that of the adversary. It often happens that a cunning debater will resort to weak arguments for the purpose of inducing his adversary to fritter away his time in answering them, and thus draw him from an attack upon positions that really add strength to his cause, although if vigorously attacked they would fall. The advocate who sets to work to refute all the arguments of his opponent is likely to be caught in a snare set expressly for him. In such a case, as John Quincy Adams says, "you promote the cause of your antagonist by making yourself the dupe of his strategem."[59] Where arguments are plainly irrelevant or immaterial, it is enough to direct attention to their immateriality,

[58] "Be concise and never weary your jury," and "leave the jury something to find out," is the advice of Mr. Crispe in his Reminiscences of a K. C., 218. "True eloquence," says La Rochefoucauld, "consists in saying all that is necessary, and nothing but what is necessary."

[59] Lectures on Rhetoric and Oratory, Vol. II, p. 33.

or irrelevancy, in a few words, and to waste no time in refuting them. When this course is resolved on, the fewer the words, and the more positive the manner in which such arguments are put aside, the better. It is, indeed, sometimes positively dangerous to fall upon immaterial and irrelevant arguments with earnestness and vigor, since such a course is very likely to induce the jurors to believe that such arguments are far more important and formidable than they really are. But a caution is here necessary. Arguments that the advocate who is to answer them knows are clearly irrelevant and immaterial are not always seen in that light by the jurors. It is often a delicate work to decide how far arguments perceived by the advocate to be wholly immaterial and totally irrelevant are supposed by the jury to be material and relevant. It must not be assumed, where there is reason for doubt, that jurors will perceive irrelevancy of the arguments; but, on the contrary, it must, as a general rule, be assumed that they do not perceive the infirmity in the argument, and, acting upon this assumption, the advocate must lay bare the infirmity so that is may be clearly perceived by every juror, or at least by the master minds of the jury. Men are more apt to be misled by irrelevant arguments than the careless thinker suspects. The advocate himself, if he be not wary and vigilant, is in danger of being led astray by irrelevant arguments, and drawn into a path that may lead him far from the merits of the controversy.

It is not always expedient to attempt to refute an argument by a direct attack upon the hypothesis on which it rests. Advocates sometimes waste their strength in the vain attempt to demolish the hypothesis constructed by their opponents. In most cases probable hypotheses can be constructed by both sides, and the ultimate question is, Which is the stronger and more probable? No great ingenuity is required to construct a theory that will seem strong, for facts are, notwithstanding the old adage, pliable things. Under the hands of a skillful advocate, they take many colors and postures. He who is called upon to attack an adverse hypothesis will, in general, do well to set up a

rival hypothesis, rather than fritter away his whole strength in the attempt to batter down that of his adversary. If he can construct a stronger and more probable hypothesis than that of his adversary, he will be the victor. Of course, he must use the materials furnished by the evidence, but a master's hand can construct rare things out of materials that in the hands of a blunderer would be wasted. But the method of refutation need not be exclusive, for, if care is taken to avoid inconsistency, there may be both a direct attack and a counter hypothesis. It is, perhaps, the better rule for the advocate to build his own hypothesis first, and strengthen it at every point by fact and inference, so that its probability may as nearly approach certainty as in the nature of the case is possible or practicable. Before he leaves it to assail that of his opponent, he should be very sure that there are no weak places that will let in the enemy. Better use all the strength and time at command in making his own hypothesis strong than to leave it unfinished for the purpose of assaulting that of the adversary. It is better for the advocate to do this, even though it may leave neither time nor strength to attack the hypothesis of the other side; for, if his own is really strong, the jury will accept it as the true and reject the other. Where, however, time and strength are at command, the better course is to combine the two methods. If this plan is adopted it is best executed by placing the rival theories side by side, and magnifying the strong points of the one and exposing the weak points of the other.

Analysis is a keen weapon of attack. Positions are more readily carried when attacked in detail than when assailed in mass. Analysis vigorously made will lay bare the weak places, and these can be made the point of vantage for the main assault. At the outset, carry some position; carry it at every hazard, for a repulse at the start discourages the assailant himself, and leads the jurors to believe that the whole position of his adversary is impregnable, while a position carried, even though it be not a very important one, gives an appearance of victory and inspires confidence. Take the arguments to pieces, and

mercilessly, if you will, dissect them into minute parts, and thoroughly expose the weakness of each. Destroy each as you go, and do not approach another until the one assailed is effectually demolished. An argument broadly assailed and only partially refuted is stronger than if it had passed unchallenged, except, indeed, in cases where the partial answer is adroitly made to appear a complete one. Jurors, and advocates, too, for that matter, are sometimes deceived by a skillful debater, who makes it seem that his refutation is complete when, in truth, it is only partial.

It is safer, as a general rule, not to attempt a direct refutation until one's own case has been so presented as to find favor with the jurors. An advocate who makes his own case seem to have merit enough to receive the consideration of the jury is in a much better situation to attack successfully than one whose case has not been so presented as to meet with some favor. For this reason the advocate should first make his own case as strong as it is possible for him to do before he assails his adversary's arguments. It is often expedient, when this course is pursued, to preface the discussion by the statement that the arguments of the adversary will be answered in due season. At all events, something must be said to prevent the suspicion that the arguments are not at once attacked because of their strength. If the arguments of the adverse counsel are really weak, and there is no reason to fear that their overthrow cannot be made complete, then the case is without the general rule, and the attack should be made at the outset.

In some instances the attack may be safely made with the greatest energy and force that can be summoned to the field of contest; but, in the greater number of cases, the more prudent course is to indirectly attack, moving quietly and surely against the positions of the adversary. An attack made with a great display of force sometimes gives, as we have said, an appearance of strength to the hostile positions that they do not actually possess, for it naturally creates the impression that, where such a great force is required, the points to be attacked must

be very strong. Lord Abinger's opinion upon this point, as, indeed, upon any point in the art of advocacy, may be safely adopted, and what that opinion is, this extract from his autobiography makes clear: "Perceval said of Law (Lord Ellenborough): 'He has great strength, which he puts forth on occasions too trivial to require it. He wields a huge, two-handed sword to extricate a fly from a spider's web.' The remark was just. Lord Ellenborough had great talents, but at the bar he always seemed to carry his point by force."[60]

It is always unwise to attack with severity where there is cause to believe that the argument upon the other side has made a favorable impression upon the minds of the jury. The reason why such a course is unwise is not far to seek. No man takes kindly to a severe denunciation of what he has himself even partially accepted as true. A criticism in bitter words upon what he has assented to, although his assent was neither permanent nor complete, is much more apt to confirm his impressions than to efface them. A man thus vexed is quite likely to go in quest of reasons to sustain his impression, and when a juror hunts for reasons to sustain his own impressions he is seldom unsuccessful. Lord Abinger's statement of his own practice is better than a code of rules. Thus writes that great advocate: "Very often, when the impression of the jury, and sometimes of the judge, has been against me on the conclusion of the defendant's case, I have had the good fortune to bring them entirely to adopt my conclusions. Whenever I observed this impression, but thought myself entitled to the verdict, I made it a rule to treat the impression as very natural and reasonable, and to acknowledge that there were circumstances which presented great difficulties and doubts, to invite a candid and temperate investigation of all the important topics that belonged to the case, and to express rather a hope than a confident opinion that upon a deliberate and calm investigation I should be able to satisfy the court and jury that the plaintiff was entitled to the verdict. I then avoided all appearance of confidence, and endeavored to

[60] Autobiography, 83.

place the reasoning on my part in the strongest and clearest view, and to weaken that of my adversary; to show that the facts for the plaintiff could lead naturally but to one conclusion, while those of the defendant might be accounted for on other hypotheses; and when I thought I had gained my point, I left it to the candor and good sense of the jury to draw their own conclusion. This seems to me not to be the result of any consummate art, but the plain and natural course which common sense would dictate." [61]

The suggestive method commended by Lord Abinger and by Dr. Franklin is even more effective in refutation than in confirmation.[62] A far greater reasoner than either of them, Aristotle, commends it, saying: "Of all forms of reasoning, however, as well confirmative as refutative, those produce the greatest effect which are of such a description that, on the commencement of their enumeration, men anticipate the conclusion, yet, without their being superficial, for the hearers, on their own parts, feel a pleasure in having of themselves anticipated it." [63] If the minds of the jurors can be aroused to an active effort to frame for themselves an answer to an opponent's argument, a great point is gained; and if the answer can be suggested in such a way as to make it seem their own work, and not that of the advocate, there need be no fear that they will doubt that the refutation is successful and complete. For this reason it is often expedient to approach the proposition which is to be refuted indirectly, and, without directly stating the reasons that refute it, to so clearly suggest them that the jurors for themselves will take up what the suggestions outline, and construct an argument out of it of their own, or, what is in effect the same thing, what they conceive to be their own. The difficult part of the

[61] Autobiography, 75, 76. The experience of the great advocate and that of the philosopher led them to an essentially similar conclusion, for Dr. Franklin and Lord Abinger both acted upon a common principle; the one applied it to the learned men with whom he disputed, while the other applied it to the jurors he desired to persuade.

[62] *Ante*, pp. 313-317.

[63] Rhetoric, Book I, Chap. XXIII, § 29.

work is to so clearly suggest the answer as to put the minds of the jurors in train, without at the same time constructing the refutation for them.

It is the practice of some cunning advocates to strike and thrust at a few points so determinedly and vigorously as to induce the belief on the part of a less wily disputant that those points are all that need be defended. This stratagem is often successful, for, by the persistent attack upon these points, they detract attention from the others, and allure the unsuspecting adversary into the ambush prepared for him, and when the time comes for reply they attack other points that, in his eagerness to repel those so persistently made, he has not well defended. Men not trained in forensic debate are often misled by a feint of this kind, and the only sure means of avoiding this result is for the advocate to determine for himself the strength of the defense he will make upon each point, and not allow his adversary to determine that question for him. Others meet defeat because they do not guard a point at all until it is too late. Bacon, speaking of those who make, in other matters, a like mistake, borrows this illustration from Demosthenes: "They were," said the great Athenian, "like rustics in a fencing school, who always, after a blow, guard the part that was hit, and not before."[64] A part left unguarded until after the blow has hit it might, in many cases, as well not be guarded at all.

A frank, fair and candid admission, expressed in clear words, is better than an implied one. An implied admission is apt to be regarded as much broader than it really is, and consequences inferred from it which do not justly follow. By stating the admission in clear words, and setting bounds to the deductions which can be made from it, the danger of its receiving greater weight than it is entitled to is materially lessened. An admission frankly made gives an appearance of fairness to the discussion of the controverted points, and secures an attentive hearing, if it does not do much more; while an implied admission creates the impression that the advocate is not candid enough

[64] Advancement of Learning, Book VIII, Chap. II.

to admit the point, yet hopes to reap an advantage from the failure of the jury to notice and consider it. An express admission often disconcerts an opponent by making it appear that he has labored to establish what was not denied. As a general rule, the wise course is to plainly mark the points where the contest is to be fought out, and bring fully into view the conceded points and the neutral ground.

Comments on the testimony of witnesses are forcible when made fairly and candidly. The design must appear to be to deal justly and kindly with all so far as duty will permit, and to praise only where praise is deserved; and to censure only where duty compels and justice requires. It is not only useless, but harmful, to directly praise a witness whose testimony is not contradicted or whose character is not assailed. Praise or defense in such cases impresses jurors with the belief that there is some infirmity that they have not detected. A man who offers a defense before he is attacked brings suspicion upon himself, and justly, for men conscious of their own rectitude never think of offering excuses or defenses for what they have done. A man who knows he is right feels that others know it, and by this feeling is controlled until his acts are assailed. An advocate who rushes to a defense where none is needed creates a suspicion that, but for his folly, would not have arisen, and invites an attack which, had no invitation been given, would be inexcusable and abortive. An advocate who knows his duty will not, in advance of an attack, lavishly praise his own witnesses, unless there be strong reasons for doing it; and he will never violently assail those of the other side unless duty requires it and just grounds support his assault. As the address moves on, a word of praise may here and there be cast in; but, unless there has been an attack, there is neither prudence nor policy in openly and avowedly praising the witnesses, for the presumption is that they have done no more than their duty. Extravagance in praising witnesses called by the party for whom the advocate speaks is weakness, except in extraordinary cases, for jurors are not apt to rate men so high as an enthusiastic and imaginative advocate is likely to do; and if the real man falls below the pictured one, the contrast will be

greatly to his prejudice. Moderation is here a virtue and extravagance a vice.

Conflict in the testimony of witnessses does not necessarily indicate that some of the witnesses have sworn falsely. Weak advocates at once assume that a conflict requires them to prove the adverse witnesses guilty of false swearing; the strong advocate assumes this only as the last resort. A conflict among the witnesses arises more often from error than from rascality. But, even if this were not true, it is true that jurors are reluctant to pronounce witnesses guilty of perjury, and will, ordinarily, gladly accept any plausible hypothesis that will enable them to reach a verdict without attributing wickedness to any witness. This consideration plainly indicates the true course, and that is, to frame some reasonable hypothesis upon which the testimony can be harmonized, or construct some plausible hypothesis which will make it probable that the witnesses have been mistaken. Circumstances must be sought for and so arrayed as to show that it was natural that a mistake should be made, and then the conclusion that a mistake was made must be established. A vigorous and deep probing of antecedent and attendant circumstances will seldom fail to bring to light things that, skilfully used, may show that it was natural that a mistake might have been honestly made. If once this be established, then it will require no great skill to prove that what might naturally happen did actually happen. The difficulty is in making it appear that it was natural that a mistake might be made, and to make this appear, the opportunity of the witness, his capacity, his means of knowledge, and all like circumstances, must be investigated with the minutest scrutiny.

Witnesses very often mistake their inferences for actual facts. At another place we have spoken of this tendency of the human mind, and we need do little more than refer to what was there said.[65] A close and keen analysis will often reveal a mistake of this kind. Especially are men apt to fall into it where prejudice, self-interest, or passion, leads them to desire to secure a

[65] *Ante*, p. 251.

verdict for the one party or to defeat the other. Even honest men are thus misled, and unconsciously state as an actual fact what is the mere product of their own reasoning. Men yield to this influence without being aware of it, and do give testimony that is untrue, and yet commit no crime. If the jury can be made to understand the influences that operated upon the mind of the witness, and to perceive clearly the actual facts within his knowledge, it will not be very difficult to persuade them that the witness has, through an error that almost any man in a like situation might commit, unwittingly given them as a fact what, in truth, is a mere inference. The circumstances, more than the positive testimony, will supply the means of showing what the witness did actually see or hear. His interest, his motives, and his prejudices, well displayed, will furnish reasons for affirming that his reasoning has led him beyond the actual facts. Of course, this plan cannot always be pursued, but there are cases where it can be made very effective. In no case, however, can it be made effective without laying a foundation by a rigid analysis of the circumstances, and a strong combination of such as tend to show what the witness did actually see or hear.

All oral testimony comes from human memory. A truthful witness can state only remembered facts. It is, at best, testimony at second hand. Memory is a vast receptacle, into which countless things are crowded, and it is no wonder that what enters the mighty throng mingles and merges with kindred things. Even if many things that enter the memory do, as some contend, soon fade from it, yet there are so many unfading things gathered and retained that the wonder is that any new thing can dwell there for a time and not receive color, form and character from what encompasses it on every side. It is undoubtedly true that things which enter the memory, and long remain, undergo changes of which the man himself is unaware. It is in many instances no fault of his that this occurs, for it is a tendency of the human mind, which only constant vigilance can avoid or restrain.

The greater the throng in the memory the greater the probability that the identity of an act or occurrence will be lost in

the throng. A man with the cares of a vast business pressing on his mind will not clearly remember, if he remembers at all, an event which aroused no especial interest. A great merchant would be less likely to remember the sale of a barrel of sugar than the farmer who bought it. A rich man, with many matters occupying his mind, would be less likely to remember the details of a transaction involving a trifling sum, to him, than the poor man to whom the sum seemed large. Our memories take up and retain what to us is important, and he who deals with few things esteems each of them important, although one who deals with many things might not so regard them. It is evident, therefore, that the accuracy of memory may often be tested by proving the situation of the parties, and by showing that the one may forget and the other remember the details of a transaction, because the memory of the one is thronged, while that of the other is not. There are, no doubt, men with marvelous memories that take up and retain many things in full detail; but these are the exceptions, for a man with a great number of things to remember usually does not so actually get details in memory as one who has comparatively few things pressing on his memory. Real progress is made when the advocate shows that the memory of the adverse witness is so crowded with other things that it is not probable that he could accurately remember and reproduce the particular fact; and if to this be added proof that the opposing witness was not in a position where his memory would be so heavily laden, the case is much strengthened.

The deeper the impression an event makes, the stronger the memory grasps it, and the more accurately it is reproduced. One who contends for the accuracy of a statement will, therefore, naturally call to its support all the facts and circumstances which make it probable that a deep impression was made upon the mind of the witness. An opposite course will naturally be taken by one who denies the accuracy of the statement, for he will array all the facts and all the circumstances which make it probable that the impression was faint and transient. If there is anything that directs particular attention to the event or dec-

laration, it will be registered, and not merely observed, and when reproduced it will receive augmented force if skilfully surrounded by circumstances showing that there was a mental registry as well as a mental perception.[66] In many instances the event is so striking as to fasten itself in memory, and when this is so the event, with its peculiar characteristics and striking incidents, may be described and amplified with profit. If there is nothing peculiar in the event, he who opposes the witness will naturally treat it as one of the common occurrences of life, which make but a faint impression on the mind and abide only for a little time in the memory.[67]

One event is remembered by another, and often strength may be given oral testimony by linking events together. The memory of an event or a declaration may be weakened by showing that it alone is remembered while associated things are forgotten. One side will do all that can be done to show that the thing the witness professes to remember stands alone, while the other will do what in him lies to show that it is remembered as one of a train of events. An event is fastened in the minds of jurors, as well as in the minds of witnesses, by associating it with some other thing of mark and importance; and it is, therefore, not only for the purpose of supporting the witness that it is well to binds events together, but it is also important for the purpose of fixing the event firmly in the minds of the jurors. A little circumstance may bind events together and make them probable, while its omission may destroy the connection and leave the memory without assistance. What caused an event or declaration to be remembered is always important to the advocate who calls the witness, for if he shows a cause why the memory should be true and the reproduction correct, he gives great strength to the testimony of his witness. On the other hand, if there be an absence of this cause a wary adversary will use it with a force that it will be difficult to withstand.

[66] Burrill on Circumstantial Evidence, 104. See also Russell v. Baptist Theological Union, 73 Ill. 377, 340; Commonwealth v. Ruddy, 184 Pa. St. 274, 290, 39 Atl. 211, 213; People v. Strollo, 191 N. Y. 42, 83 N. E. 573, 575.

[67] See 2 Moore on Facts, § 804.

In almost every address to the jury the advocate is called upon to comment upon testimony given by witnesses who profess to repeat admissions made by some party or some witness, and there is, in this branch of the work, much more skill and ingenuity required than the careless or unreflecting advocate is apt to imagine or conceive. It is well known that evidence of oral admissions is regarded as "subject to much imperfection and mistake," and the reason for this opinion is a plain one. Men not only often misunderstand what they hear, but err in repeating it.[68] A parlor game described by Sir Frederick Pollock well illustrates the uncertainty of testimony of oral admission. "One evening," writes Sir Frederick, "we had great success in playing the game of Russian scandal. An anecdote or incident (which should be one not generally known) is written down on paper, and then confidentially communicated to one member of the company, who, in the same way, repeats to the next, and so on until, by this private course of tradition, it reaches the last person, who is then called upon to repeat aloud what he has heard. The paper is then read, and it is curious to note how entirely a story will almost always get altered in its passage through eight or ten people."[69]

In addition to the reasons usually given for regarding the testimony of oral admissions as subject to "imperfections and mistake," may be given the further reason that, what the witness hears almost always blends with other things already in his memory, and, unknown to him, takes form and color from them. It is, as we have elsewhere said, almost impossible for anything to enter the human memory without receiving an impression from the throng of things already there, and this it is that so often leads men into undesigned error in the attempt to repeat what they have heard from the lips of others.

The advocate who relies upon verbal admissions will naturally do all he can to prove that the witness was in a situation to hear what he professes to repeat, that he was capable of accu-

[68] See Risley v. Indianapolis &c. R. Co., 7 Biss. (U. S.) 408, 20 Fed. Cas. No. 11859.

[69] Personal Remembrances of Sir Frederick Pollock, Vol. 2, p. 77.

rately understanding it, that there was a reason why he should remember it, and that there is no reason why he should not correctly repeat the words he heard. Events will be brought forward that clearly mark the situation, circumstances will be adduced that make it probable that the witness did understand what was said, reasons for remembering will be urged, and an absence of facts which might influence the witness to incorrectly repeat what he heard will be shown. This work, as we have elsewhere suggested, will take the advocate deep into the circumstances of the case; his search, if well prosecuted, will be prolonged and minute; it will not be confined to the principal facts, but will extend into the fringes of the evidence and dwell among the outlying circumstances.

The advocate who denies the correctness of the testimony will naturally dilate upon its known weakness, and will expatiate upon the infirmities to which all such testimony is subject. He will show, if he can, that the memory of the witness is so thronged that it is not probable that he could accurately remember what he professes to have heard. The advocate will also do his utmost to prove that there is no reason why the words should have impressed themselves upon the memory of the witness, and he will show, if it be in his power to show, the reasons why the words must have received tone and color from the things with which they mingled, or from the interest and prejudices of the witness. This plan he will not, of course, pursue if he denies that the words the witness professes to repeat were spoken, for, in that event his effort will be to make it clear that the witness did not hear any such words because they were never uttered. If the case is rested upon a denial, then, it is obvious, the true course is to show that it is improbable that such admissions were ever made, and to make good this position the interest, honesty, capacity and situation of the witness will be thoroughly discussed. His opportunities, his character, and his knowledge, will be the subject of criticism and discussion, and this will generally carry the advocate into a wide field. Necessarily, the discussion will

take a wide range, for little good would be accomplished by resting the case on a naked denial.

Comment upon the testimony of adverse witnesses loses in strength as it increases in fury. Abuse adds no strength to an attack. A witness may be proved corrupt by facts, but not by abuse. Moderate and temperate discussion is much more effective than vehement and noisy vituperation. If a witness is corrupt, plain, strong words will exhibit his corruption better than coarse words. If an attack must be made on a witness, it is better made with an air of reluctance than with an air of pleasure. One who rushes to an attack as to a work that delights him weakens his assault, for he makes it seem that he assails the witness to gratify his own malicious hatred. One who approaches a corrupt witness as though he did it with reluctance, and impelled by a sense of duty, adds strength to the attack, for jurors take kindly to a man who does his duty because it is his duty, and does it as gently and considerately as he can. A quiet thrust stings deeply. Mere fury of words adds nothing to the keenness of the thrust. A witness unjustly or immoderately abused is taken under the protection of the jurors, for disinterested men protect those they believe others persecute. The quick, strong impulse of human nature is to espouse the cause of the weak against the strong. Jurors regard, and rightly, too, a witness who can utter no word in his defense as the weak, and the advocate as the strong, and they are not slow to shelter the one and condemn the other. It may be pleasant for the advocate to have a giant's strength, but if he employ it unjustly or immoderately he may expect a tyrant's fate, for the jurors hold the power. It is, therefore, always impolitic to assail the character of a witness unless there are strong reasons upon which the assailant can maintain his assault. These reasons the evidence must supply, not the imagination of the advocate. But even where there are reasons justifying the attack it is unsafe, except in extreme cases, to assail in an immoderate and ill-tempered manner. An unsuccessful attack, whatever be the cause, recoils with great effect upon the party who makes it.

A witness whose character is successfully assailed, or who is effectively contradicted on a material point, weakens the case of the party by whom he is called. One thoroughly corrupt witness may often cloud a company of witnesses with suspicion. An adroit advocate will make effective use of the fact that one material witness among many is unworthy of credit. A skilful movement of the one bad witness through a throng casts a taint upon all, for men readily conclude that if a party has called to his support one corrupt witness whose dishonesty has been detected, he has probably called more whose dishonesty has escaped undetected. It is not politic to openly avow that one bad witness indicates the character of the others, for a quiet suggestion is more effective than an open charge. More than one verdict has been secured by making it appear that the case rests on the testimony of the discredited witness, or that those of the same side are no more worthy of confidence than he is. The worthless witness, if made the central figure of the company of witnesses, may darken the whole case; but it is not prudent to devote too much direct attention to him, for, if put in the central position by quiet and indirect means, rather than directly and avowedly, he will do all the more harm to the testimony of those associated with him as witnesses. If the witnesses can be kept together as associates, the greater the harm the bad witness will do the party who called him; for men are judged, as the fable teaches, in no small measure, by the company they keep.

The advocate who has among his witnesses a bad one will, if he can, separate the witnesses, and not treat them as close associates. This he may well do, for a bad man does sometimes get into the company of good men, and good men are sometimes thrown into the company of the bad.[70] The opposing advocates will naturally pursue opposite methods; the one will keep the witnesses together as associates, and the other will single out the bad witness, and, if he can, show that his case rests on the testimony of other witnesses not associates of the bad one. If, however, he must rely on the testimony of a bad

[70] See Plyer v. German Am. Ins. Co., 121 N. Y. 689, 24 N. E. 929.

witness, he will gather every particle of corroborating testimony he can, and, binding all the particles together, will place what he has gathered and combined where it will best support the weak witness. If there appears to be no motive for false swearing, and there are some corroborating circumstances, the task of supporting the witness is far from hopeless; but if a motive does exist that would influence such a witness to swear corruptly, the task, if not entirely hopeless, will be a very difficult one. Although a bad man will probably swear to the truth where there is no motive to do otherwise,[71] the probability is much stronger the other way where there is a motive to which such a witness is likely to yield.

While there is more of error in human testimony occurring through fault of memory, and from mistaking inference for observation, than there is of error arising from wickedness and corruption, yet there is, it must be owned, much designedly false testimony given in our courts of justice. Men do swear falsely, and it is not an easy task to expose their perjury.

One of the most important things to get before the jury when dealing with a corrupt witness is his motive. It is safe to assume that in every case of false swearing there is a motive which influences the witness to depart from the truth. Bentham, after arguing that all acts, good and bad, are attributable to some motive, declares that, "In the whole catalogue of motives there is none which it not capable of producing mendacity."[72] Apparently trivial motives influence men to do wrong. One who reads the history of crime will find that motives comparatively trivial have impelled men to commit atrocious crimes.[73]

It is often of much benefit to bring to the minds of the jurors the examples found in the books of persons who have been moved to commit crimes by motives entirely disproportioned to the magnitude of their wicked deeds. The motive may arise

[71] Gates v. Kelley, 15 N. Dak. 639, 110 N. W. 770, 773.

[72] Rationale of Judicial Evidence, Book I, Chap. XI, § 2.

[73] 1 Wharton's Criminal Law (9th ed.), § 121; Burrill's Circumstantial Evidence, 317, 318.

from wounded pride, from envy or jealousy, from partisan malice, or from unreasoning prejudice, from avarice or greed, from revenge or spite, from a desire to assist a friend or punish an enemy, from a desire to secure praise and avoid censure, from a desire to obtain notoriety, from a purpose to swim with popular current, and from many other causes that operate upon the minds of men.

In almost every instance it is prudent to trace the motive to its source, and to develop its influence by the aid of illustrations and examples. Even though the witness should admit the existence of an unfriendly motive, the advocate should not rest content with the bare admission. The motive should be clearly exhibited, and its effect amplified. When, as often happens, the witness will not admit that there is any sinister motive operating upon his mind, a rigorous analysis of all the evidence, direct and circumstantial, is required, and the object of the analysis, that of discovering and exposing the motive, should be kept steadily in view. Every nook and cranny should be searched, every hiding place should be penetrated, and every relevant story sifted. It is no easy task, be it always remembered, to persuade a jury that a witness has committed perjury; but when a motive sufficient to induce him to commit it is discovered and exhibited, very much is done toward bringing upon him the condemnation of the jurors, and when this is accomplished a sore and rankling wound is inflicted upon the party in whose behalf he testifies.

In developing the effect of a motive upon the testimony given by a witness, it is important to ascertain and exhibit his manner of life, his associates and his character. Perhaps there is no point upon which men differ more widely than that here under immediate discussion. A motive sufficient to lead one man astray will not move another a hair's breadth from the path of rectitude.

Occasion has much to do with motive. A man may yield to temptation on one occasion and resist it on another.[74] The effect

[74] But as observed by Judge Lamm, in Chambers v. Chambers, 227 Mo.

of a motive cannot, therefore, be accurately measured without a knowledge of the occasion and all attendant circumstances. The truth is, that whatever men do is prompted by some motive, good or evil. Good men are influenced by high and honorable motives; bad men yield to evil ones. When, therefore, motive becomes the central point of discussion, many incidental matters demand consideration, and the discussion covers a wide field. A survey of all surrounding things is essential, and each particular thing tending to prove a motive requires notice. In every case there are contending forces, and whether the one or the other shall prevail depends, in no small degree, upon the character, the associates, the mode of life, and the capacity of the person involved. Bentham truly says: "On every occasion, the probability of veracity, and thence, so far as depends upon will, of correctness and completeness of testimony, is as the sum of the force of the mendacity-restraining to the sum of the mendacity-exciting motives."[75]

Among the many things that it is important to bring into view upon the question of motive are: the interest of the witness in the result of the litigation, his association and intimacy with the party, his friendship for the one party and his hostility to the other, his friendliness or unfriendliness to the cause benefited or injured by the result of the litigation, his likes and dislikes—these, and many more things of kindred nature, demand investigation and discussion. Better hours of labor bestowed upon this part of the work than minutes on mere ornamentation and embellishment. More profit will accrue from a deliberate and calm presentation of the things that constitutes motives than from the severest denunciation, though it be admirable as a mere rhetorical display. At all events, experience proves that he is the wisest man who, in such matters as that with which we are here concerned, trusts to facts and circumstances rather than to invective. "Evidence is eloquent," and upon no point is its power greater than upon the subject of human mo-

262, 127 S. W. 86, 137 Am. St. 567, 580, it generally happens that "where will and opportunity embrace results are bred."

[75] Rationale of Judicial Evidence, Book I, Chap. VI, § 1.

tives. Evidence, as we here employ the term, means more than the mere words of witnesses; it means that which the skill of the advocate, by conjecture, hypothesis and illustration, elaborates into a means of proof.

Where witnesses are false, motives, important as they are, are not the only things to be searched for and developed. At the bottom, however, of every wilfully-false story will be found some evil motive, but it is not always possible to get that far down. While the advocate may always safely assume that there is no designedly false testimony without an influencing motive, it is not always in his power to drag it from its hiding-place, and so directly exhibit it that it can be perceived by the jury. But what he cannot do directly he may do indirectly. Collateral matters—collateral, however, only in the sense that they do not directly exhibit the motives—will require discussion. The behavior and the manner of the witness, his capacity and intelligence, his opportunities of knowledge, the probability and consistency of his story, are subjects for comment.[76] If the testimony is contradicted by direct or circumstantial evidence, it is necessary not only to show the point of conflict, but to dilate upon its importance and effect. If a clear and flat contradiction between the circumstances and the testimony of the witnesses can be clearly shown, a point will be gained that will do much toward deciding the contest.[77] Where there is a conflict, all the circumstances that oppose the testimony are to be gathered together, marshaled in orderly array, and, in their combined force, brought directly against the testimony. The circumstances, compactly bound together by a strong and probable hypothesis, will do much more execution than if brought against the testimony in detail.

In discussing, under other heads, the effect of testimony, we

[76] See Anderson v. Siljengren, 50 Minn. 3, 52 N. W. 219; Gonzales v. Adoue (Tex. Civ. App.), 56 S. W. 543; Reader v. Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461; Evans v. Lipscomb, 31 Ga. 71; United States v. Yebanez, 53 Fed. 536; The Argo, 1 C. Rob. 158, 159.

[77] See Lewis v. Lewis, 76 Conn. 586, 57 Atl. 735; Wohlfahrt v. Beckert, 92 N. Y. 490; Princeton Coal Co. v. Roll, 162 Ind. 115, 66 N. E. 169.

have more than once touched upon the matters which affect the weight of testimony and the credibility of witnesses; and in speaking, as it is now our immediate purpose to do, somewhat in detail of the value of testimony and the trustworthiness of witnesses, it is impossible for us to avoid repeating something that we have elsewhere said. If apology be needed for this, it may be found in the practical importance of the subject; for of its practical importance there can be no doubt, since a great part of almost every address to a jury is devoted to a discussion of the value of testimony and the credibility of witnesses.

Credibility is not controlled entirely by the honesty or fairness of the witness, nor is the value of the testimony to be estimated solely by the character of the person who delivers it. The discussion of the credibility of a witness, as well as of the value of his testimony, is by no means confined to a consideration of his character or his capacity, although these things usually occupy conspicuous and controlling positions in the discussion.

It is, as every one knows, essential to the credibility of testimony that it should appear that the witness had an opportunity to acquire the knowledge he professes to possess. In proportion as it appears that the opportunity was inadequate, in that proportion is the value of his testimony diminished. The witness may have been at the place where the event he assumes to describe occurred, and yet he may not have been in a situation to accurately observe it, nor in a condition of mind to fully perceive it. Thus, a man influenced by fear, excitement, anger or some other passion cannot so well observe an occurrence, nor so clearly retain it in memory, as a dispassionate observer.[78] It is not enough, therefore, to show that there was an opportunity for acquiring the knowledge, for it should also appear that there was a capacity for acquiring and retaining it. Indeed, there should be something more to make the testimony entirely satis-

[78] Floyd v. Philadelphia R. Co., 162 Pa. St. 29, 29 Atl. 396; Dr. Haus Gros, Criminal Investigation, 65, 78, *et seq.* So, on the other hand, excitement, fear, or the like, may excuse some inaccuracy of perception or statement. Baltimore &c. R. Co. v. Landigan, 191 U. S. 461, 477, 48 L. Ed. 262, 24 Sup. Ct. 137, 142.

factory, for it should appear that there was some reason for acquiring and retaining the knowledge the witness assumes to possess. If it appears that there was no reason why the fact should have impressed itself upon the memory of the witness, his testimony is much weakened.[79] The reason for this is evident; what is not strongly impressed upon the memory is not clearly perceived nor long remembered. If a witness testifies to what he heard years before, and no reason is given why he should have been strongly impressed by what he asserts he heard, his testimony is of comparatively little value; but if it appear that there was a reason why it should firmly take its place in his memory, it would be otherwise.[80] A witness who professes to remember dates and things of like nature that do not ordinarily fasten themselves in memory is usually untrustworthy, for honest witnesses generally profess only to remember important things.[81] The untrustworthiness of a witness who professes to remember unimportant things, and who confesses that he cannot remember important ones, may be attributable to either fault of memory or to dishonesty; but ordinarily such a witness will be found to be a dishonest one.

An imperfect recollection of some things does not necessarily imply that the witness speaks untruly as to those things which he assumes to remember. The most honest and intelligent witness may remember some things and forget others.[82] But a witness who professes to remember some things, and yet asserts that he cannot remember others directly connected with them,

[79] 1 Kottnitz v. Bagley, 16 Tex. 656; Chandler v. Hough, 7 La. Ann. 441; Parker v. Chambers, 24 Ga. 518.

[80] Burrill's Circ. Evidence, 103; DeQuincey's Autobiographic Sketches (ed. 1853), 226; Locke on the Understanding, Book II, Chap. X.

[81] Willett v. Fister, 18 Wall. (U. S.) 91, 21 L. ed. 804; Black v. Black, 38 Ala. 111. See also, McNulty v. Hurd, 86 N. Y. 547, 553; Lee Sing Far v. United States, 94 Fed. 834; 2 Elliott Ev., § 953.

[82] Jackson v. McVey, 18 Johns. (N. Y.) 330; Pond v. State, 55 Ala. 196; State v. Cowan, 7 Iredell L. (N. Car.) 239. See also, Moran v. Catholic Soc. &c., 107 La. Ann. 286, 31 So. 658.

is seldom worthy of credit.[83] Where a witness professes to remember things upon which he cannot be readily contradicted, and declares that he forgets those upon which he would be open to contradiction, it may be confidently assumed that he is not entitled to be treated as an honest witness.[84] There may, of course, be exceptions to this general rule, but they are not very numerous. A dishonest witness is very apt, when closely pressed, to take refuge behind the shelter afforded by the phrase, "I don't recollect."[85] When there is reason to believe that this shelter has been sought by a knavish witness, the best course is to make prominent his assertions that he does not remember; show that there was a motive for not remembering, or that he feared contradiction, and make it clear that it is improbable that he should remember what he professes to remember, and yet forget the other things connected with it.

Silence, even upon important points, does not necessarily, nor invariably, imply that a witness is unworthy of credit. The omission of important or striking matters does, in general, tend to discredit the testimony of a witness;[86] but the omission of things which a witness would naturally presume his hearers understood without their mention, strengthens rather than weakens, the testimony of a witness.[87] Truthful witnesses do not, as a general rule, enter into minute detail, but, on the contrary, tell their story in outline rather than in detail. They give the

[83] Gibbons v. Potter, 3 Stew. (N. J.) 204; United States v. Lee Huen, 118 Fed. 442, 461.

[84] See French v. Eastern Trust &c. Co. 91 Me. 485, 40 Atl. 327; Gibbons v. Potter, 30 N. J. Eq. 204, 210.

[85] A famous example is that of the Italian witnesses in Queen Caroline's case. See also, Haydcock v. Haydcock, 33 N. J. Eq. 494, 499.

[86] See Scott v. Crerar, 11 Ont. 541; State v. Cowing, 99 Minn. 123, 108 N. W. 851, 855.

[87] "The mere omission to mention the occurrence of what was customary is no proof that it did not occur." Wilson's Logic, 229. So, "In daily life," says Mr. Train, "we are quite as likely as not to be deceived by what we have seen, and this fact is so familiar to jurors that they are apt to distrust witnesses who profess to have seen much of complicated or rapidly conducted transactions." Prisoner at the Bar, 227.

material features of an occurrence, but omit the minor. A story told with great attention to details, and with an evident purpose to make it consistent and probable, usually excites suspicion. For the most part, it is the untruthful witness who prepares and delivers his story with unusual caution and care. The honest witness, confident of the truth of his testimony, seldom resorts to extrinsic aid to strengthen it. While the failure to make mention of important things does not always impair the value of testimony, it may very often do so. In cases where there is a motive for suppressing a fact, then the failure to mention it is a circumstance of much weight against the truthfulness of the witness. So, too, it is always an important consideration where it appears that the omission was designed. It may be here noted, although possibly at the expense of a slight digression, that the omission to mention a thing may supply very strong evidence that it does not exist. For example: "The omission from an inventory of all reference to a valuable piece of property may, where the evidence is conflicting, determine the question of ownership."[88]

Where the circumstances are such as to make it probable that, if the thing had existed, the witness would have mentioned it, the failure to mention it does, in the absence of an explanation, lead to one of two conclusions: one is that the thing did not exist, the other that the witness is not trustworthy.[89] Which of the two conclusions is correct in any particular case can only be determined by a careful and skilful analysis of the facts and circumstances of that case. What would be a just conclusion in one case might be entirely incorrect in another. In most cases a careful and minute presentation of all the facts and all

[88] Hill's Rhetoric, 205.

[89] See for a careful consideration of the general subject of matters that may render the testimony of a witness unsatisfactory even though uncontradicted by any other witness, United States v. Lee Huen, 118 Fed. 442. The failure to produce material evidence in the control of one party, without explanation, may also justly give rise to an adverse presumption of inference. Kirby v. Tallmadge, 160 U. S. 379, 383, 40 L. ed. 463, 16 Sup. Ct. 349; Hall v. Vanderpool, 156 Pa. St. 152, 26 Atl. 1069; Pennsylvania R. Co. v. Anoka Nat. Bank, 108 Fed. 482, 486, 47 C. C. A. 454.

the circumstances to the jury is required in order to enable them to reach a just conclusion, and the advocate who contents himself with a general discussion of the direct evidence or the prominent facts, but fails to gather and group in strong positions the minute circumstances which tend to establish the conclusion that the cause of his client requires, omits, and without excuse, a very important part of his duty.

False witnesses sometimes deal in generalities, and keep as far as possible from details. There are, indeed, two classes of false witnesses; one class is very careful to go into minute details; another avoids them, and only gives statements of the most general character. The common law has borrowed from the civil law the maxim, "A person who intends to deceive deals in general terms," and this maxim fairly applies to one of these two classes of witnesses, although it applies with more force to fraudulent schemes and transactions.[90] Where the witness deals in generalities, he usually manifests great care to keep away from points upon which he is likely to come into collision with other witnesses, and by this course sometimes betrays himself. In case a witness is unusually careful to mention details, the best policy is to show that it is unnatural that a person speaking the truth would so closely remember minute details, and to appeal to experience in proof of the fact that truthful witnesses do not, as a general rule, profess to remember more than the important facts. On the other hand, where the witness exhibits a design to avoid details, the expedient course is to show that, if he knows anything at all of the matter about which he assumes to speak, he must also know the details which he omits, and that he omits details because he fears contradiction.

It is no doubt true that many false witnesses betray themselves by their behavior under examination, and for this reason eye and ear should be constantly and vigilantly attentive; but not all false witnesses betray themselves by their conduct, and sometimes honest and sincere witnesses do not conduct themselves well under examination. There are many cases which influence honest witnesses to conduct themselves in such a manner

[90] Broom's Legal Maxims, marginal, p. 289.

as to arouse suspicion and excite distrust. Fear, nervousness, diffidence, or lack of confidence, may sometimes give a tone and color to the testimony of an honest witness that much impairs its value. The acute advocate who supports a witness will do all that he can to ascertain and present to the jury the true cause of the apparently bad behavior of the witness. Things that to the careless observer seem collateral and unimportant will be seized by him and made to appear direct and material. The age of the witness, his intelligence and capacity, his business, his acquaintance with men and affairs, his knowledge and familiarity with judicial proceedings—these, and matters of a similar character, will all be laid before the jury to account for the manner and conduct of the witness. The advocate who assails the witness will, if he can, show a motive accounting for the conduct of the witness, or will urge that his manner is attributable to a feeling of insecurity that so often makes a dishonest witness betray his guilt. The field of work for the advocate who defends, as well as for the one who assails, is wide, and the chances are greatly in favor of him who most ingeniously and industriously works that field. The careless and the indolent will fare badly, but the industrious and the careful will reap a goodly profit.

Interest, we need hardly say, is a potent influence, and often causes men to swerve from the truth. Interest may exist without any direct hope of reward, or fear of injury. Thus, agents and servants are, in general, interested in the success of their employers, although they may themselves derive no advantage from it. But interest in a pecuniary sense is, by no means, the only interest that affects the credibility of a witness. There is the interest of kinsmen,[91] the interest of policemen and detectives, of spies and informers, of accomplices and of partisans.[92] In truth, the interests which move witnesses are as various and numerous as those which influence men in the ordinary affairs of life, although the restraining influences of the oath and the occasion do, in most cases, greatly limit and

[91] Kansas &c. R. W. Co. v. Little, 19 Kan. 267.
[92] See 2 Elliott Ev., §§ 957–969.

control the operation of the motives excited by an interest in the result of a forensic contest. Interest affects the value of testimony, but it does not necessarily discredit a witness. Interested witnesses may be truthful, and they often do speak the truth; but, as a fact, although this cannot be safely asserted as a pure legal proposition, the testimony of a disinterested witness, all other things being equal, is preferred to that of an interested witness. The interest of a witness supplies the foundation for an argument, and often for a very convincing one, against the value of his testimony, but it does not entitle the advocate to assume, as matter of law, that he is unworthy of credit.[93]

"False in one thing, false in all," is an accepted maxim in the law of evidence; but it is not easy to defend the maxim, as the expression of a legal principle, upon strict logical grounds. The maxim, in strictness, expresses rather a presumption of fact, or a deduction from experience, than a rule of law. Here, as in other branches of jurisprudence, brevity and force of expression have been accepted at the sacrifice of accuracy. Maxims, as we have shown elsewhere, are very often misleading, and it may well be doubted whether strict truth does not require that the one we have quoted be classed with those that have done more harm than good. At all events, the maxim is one that in actual practice should be applied with care and acted upon with caution. It is, doubtless, entirely just to argue, as matter of fact, that a witness deliberately and designedly false in one thing should be assumed to be so in all;[94] but whether it can be justly asserted as a legal rule that a witness designedly false in one thing is so in all, is not so clear. The courts have with care and caution applied the maxim we are discussing, and have given it a much more limited meaning than a careless reader would assign it. In order that the maxim may be applied as a rule of law, it must appear that the matter in which the witness testified falsely is one of a material character, and that his testimony respecting it was knowingly and wilfully false. Where the

[93] See 1 Moore on Facts, § 80, *et seq.*

[94] 2 Elliott Ev., § 956.

matter is immaterial, or there is a probability of mistake, or where there is a mere contradiction, unless the contradiction is so strong as to show that the witness knowingly and wilfully testified to what was not true, the maxim cannot be applied as a rule of law.[95] It would seem, upon principle, that the maxim is but an advisory caution, which the jury may or may not heed, and not an imperative rule of law which they must take without question from the court. It is difficult to perceive why the jury may not believe some parts of the testimony of a witness, although they may conclude that in some material respects it is knowingly and wilfully false.[96] It is easy to conceive of cases where there may be some motive impelling a witness to swear falsely as to one thing, and yet exerting no influence at all upon other things. So, too, it is easy to conceive cases where part of the testimony of a witness may be so strongly fortified as to command belief, and yet other parts of it be designedly and corruptly false. Where a witness wilfully and knowingly states what is false, his entire testimony is, unquestionably, to be regarded with suspicion; but it is not perceived upon what logical ground his entire testimony can, as a pure matter of law, be condemned and disregarded.

Testimony is often very greatly strengthened by merely incidental matters seemingly of little importance.[97] By gathering these little incidental matters together, and skilfully grouping them, an appearance of probability may be given to testimony

[95] The Santisoma Trinidad, 7 Wheat. (U. S.) 337, 339, 5 L. ed. 468; State v. Mix, 15 Mo. 153; O'Rourke v. O'Rourke, 43 Mich. 58; People v. Strong, 30 Cal. 151; Del v. Oppenheimer, 9 Neb. 453; Swan v. People, 98 Ill. 610; Callanan v. Shaw, 24 Iowa 441; Galleher v. People, 82 Ill. 145.

[96] Pennsylvania Co. v. Conlan, 101 Pa. St. 93; Finley v. Hunt, 56 Miss. 221; People v. Hicks, 53 Cal. 354; People v. Sprague, Ibid, 491; Hardee v. Williams, 30 Ga. 921; Lewis v. Hodgson, 17 Me. 267; State v. Spencer, 64 N. Car. 316; Church v. Chicago &c. R. Co., 119 Mo. 203, 23 S. W. 1056.

[97] Circumstances may corroborate witnesses as well as discredit them, and "a jury has the right, in weighing testimony and giving credence to witnesses, to consider the assertions of a witness in the light of surrounding circumstances." Werre v. Northwest Thresher Co. (S Dak.), 131 N. W. 721, 723.

that will make it irresistible. As said by Archbishop Whately, in speaking of the value of apparently trifling circumstances: "Paley, in his admirable specimen of the investigation of this kind of evidence, the *Horæ Paulinæ,* puts in a most needful caution against supposing that, because it is on very minute points that this kind of argument turns, therefore the importance of these points in establishing the conclusion is small. The reverse, as he justly observes, is the truth, for the more minute, and intrinsically trifling, and likely to escape notice, any point is, the more does it preclude the idea of design and fabrication."[98] It is very frequently the case, as we have incidentally suggested, that matters of comparatively trifling importance can be made efficient instruments for diminishing the value of testimony. Little things, when skilfully used, may, indeed, sometimes utterly destroy the testimony of a witness. This is so for the reason that they may be made to show a design on the part of the witness to produce a false impression. But, as it is not always easy to discriminate between the things that really do impair the testimony of a witness and those that are devoid of influence, the mistake is not infrequently made of attacking where there is no ground upon which an attack can be maintained, and this mistake, as we have elsewhere said, is a very serious one. If, we may assert as a general rule, there appears to be a design to produce a false impression by avoiding details and dealing in generalities, or, if there appears to be a corrupt design in detailing particulars with extraordinary precision, an attack upon the integrity of the witness may be safely ventured.

"In respect to the number of witnesses, it is evident that, other points being equal, many must have more weight than one, or a few;"[99] but while it is true that many witnesses should outweigh a few, still it by no means follows that the many must

[98] Whately's Rhetoric, Part I, Chap. II, § 4. Mr. Warren earnestly recommends, and with great reason, every lawyer to study Paley's *Horæ Paulinæ.*

[99] Whately's Rhetoric, Part I, Chap. II, § 4; Kentner v. Kline, 41 N. J. Eq. 422, 4 Atl. 781; Graham v. State, 92 Ala. 55, 9 So. 530.

prevail, for it is evident that the weight of testimony does not always depend upon the number of witnesses. It is true, as a general rule, that it is less probable that many witnesses have sworn falsely, or have made mistakes, than that a few have done so, but this consideration alone does not measure the value of the testimony.[100] The testimony of many witnesses may be so improbable as to justify an entire disregard of it, or that of the few may be so intrinsically strong as to outweigh that of the many. Courts have refused to give credit to testimony where it was so improbable as to be unworthy of belief, and that, too, in cases where there really was no opposing testimony.[1] Where the stories told by witnesses appear to be joined and grooved together by design, the testimony of all of them is materially weakened, for where design appears there is almost always corruption. It cannot, however, be assumed, because witnesses agree upon prominent points, that there is a design to produce a false impression; but where there is an extraordinary and an unnatural agreement as to minor details there is almost always just reason to suspect that the witnesses are dishonest. Where design is present honesty is absent.

It is folly to waste time in exposing immaterial inconsistencies and contradictions. Most jurors know that few true stories agree in minute particulars. Experience teaches that where there is agreement in substantial matters, and diversity in immaterial things, there is truth. "I know not," writes Archdeacon Paley, "a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of

[100] Hill's Rhetoric, 205; Trager v. Webster, 174 Mass. 580, 55 N. E. 318; St. Louis &c. R. Co. v. Union Trust &c. Bank, 209 Ill. 457, 70 N. E. 651; 2 Elliott Ev., § 968.

[1] Elwood v. Western Union Tel. Co., 45 N. Y. 549; Blankman v. Vallejo, 15 Cal. 638. In the recent case of Tillson v. Maine Cent. R. Co., 102 Me. 463, 67 Atl. 407, it appeared that a number of witnesses must have been either color blind or false in their testimony, and the court refused to give any effect to such testimony, deeming it incredible as in contravention of physical laws. See also, United States v. Post, 128 Fed. 953, 954. But very unusual and seemingly improbable things sometimes happen. See Moore on Facts, § 150, *et seq.*

some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression on the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud."[2]

History supplies many examples of an agreement in substantial matters and disagreement in immaterial matters. Thus, for example, Prescott speaks of a famous historical event: "This famous tourney, its causes and all the details of the action, are told in as many different ways as there are narrators, and this notwithstanding it was fought in the presence of a crowd of witnesses who had nothing to do but look on and note what passed before their eyes. The only facts in which they all agree are that there was such a tournament, and that neither party gained the advantage."[3]

It is a rule of logic, and some of the authorities assert it to be a rule of law, that the testimony of a witness that he saw a thing occur is, all other things being equal, to be preferred to that of a witness who simply testifies that he did not see it. In other words, positive testimony is of greater value than negative.[4]

[2] Paley's Evidences of Christianity, Part III, Chap. I.

[3] History of Ferdinand and Isabella, Vol. 3, p. 103. One who reads the different accounts of the battles of the War of the Rebellion, published in our magazines, may not doubt the truth of Paley's Doctrine that we may believe that the principal event did occur, although witnesses differ as to details; but he will, we fear, be much in doubt as to the reliance to be placed in the stories of some of the narrators.

[4] Cullane v. R. R. Co., 60 N. Y. 133; Ralph v. Chicago &c. R. Co., 32 Wis. 177; Stitt v. Huidekopers, 17 Wall. (U. S.) 384, 21 L. ed. 644; Kennedy v. Kennedy, 2 Ala. 571; Johnson v. State, 14 Ga. 55; Hepburn v. Citizens' Bank, 2 La. Ann. 1007; Delk v. State, 3 Head. (Tenn.) 79; Jackson v. Loomis, 12 Wend. (N. Y.) 27; Johnson v. Whiddin, 32 Me. 230; Johnson v. Scribner, 6 Conn. 185. See also, Kielbeck v. Chicago &c. R. Co.

It is, as every one knows, the lesson of experience that one of two men, at the same time and place, may observe a thing that to the other passes unnoticed. But it is quite difficult to maintain the doctrine that, as matter of law, positive testimony is to be preferred to negative. It is undoubtedly the right of the advocate to argue that positive testimony outweighs negative, and the argument is a forcible one; but it is doubtful whether a jury can, in ordinary cases, be instructed to give preference to the positive testimony.[5]

It is not always easy to determine whether the testimony is affirmative or negative, for, as shown by the examples given in the treatises on logic, a proposition may be in form negative while in reality it is affirmative.[6] Thus, in one case it was held that the testimony of a witness who was in a situation where he could see what occurred, and whose attention was aroused, that a person did not strike a blow, was affirmative and not negative.[7] It is not safe, ordinarily, to concede that testimony is negative because it is so in form, for, in many cases, testimony that, at a careless glance, seems to be negative will, on close examination, be found to be affirmative.[8]

The value of negative testimony depends, in a very great degree, upon the situation, attention and condition of the witness, and the like. Thus, the testimony of a witness that he did not hear the clock strike might be of little weight if he was not giving it attention, or was engaged in other affairs; but it might have great weight if it should satisfactorily appear that

(Neb.), 97 N. W. 750; Paanhan Sugar &c. Co. v. Palepala, 127 Fed. 920, 925, 62 C. C. A. 552.

[5] State v. Gates, 20 Mo. 400; Campbell v. New England &c. Co., 98 Mass. 381; Johnson v. Scribner, 6 Conn. 188; Ohio &c. R. Co. v. Buck, 130 Ind. 300, 304, 30 N. E. 19; Atchison &c. R. Co. v. Feehan, 149 Ill. 202, 36 N. E. 1036. It is certainly improper, in most jurisdictions, to do so without careful qualification.

[6] Bowen's Logic, 243; Grabill v. Ren, 110 Ill. App. 587.

[7] Coughlin v. People, 18 Ill. 266. See also, Butler v. Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877; Lee v. Chicago &c. R. Co., 80 Iowa 172, 45 N. W. 739.

[8] Sidgwick on Fallacies, 65.

he was in a situation to hear, and that his attention was fully aroused and directed to the clock. There is, indeed, no conceivable reason why the testimony of a witness whose attention is aroused and concentrated upon a particular point may not outweigh that of a witness who, although he testifies to an affirmative, was not in a situation or condition to observe and note what occurred.[9] It is obvious from what we have said that the wise advocate will not yield, without a struggle, to the assumed superiority of affirmative testimony, even where he concedes that the testimony of his witness is negative in substance and not merely in form; for he will show, if he can, that his witness had an opportunity to observe what he professes to have seen, and that his attention was concentrated upon the occurrence; and he will, also, do all that ingenuity and persistence can do to show that the attention of the adverse witness was diverted, and that he was not in a situation to clearly observe and note what occurred.

One of the grounds for assailing the testimony of a witness that is often taken by the advocate is, that at some other place and time he has made statements different from those made on the witness stand. In order that the attack on this ground may be successful there should be not simply a contradiction, but a contradiction upon some material point. It is, of course, fair matter for comment if there be some inconsistency, even if not material, between the two statements, but unless the inconsistency is in reference to some matter of importance it is not at all probable that it will influence the jury. The mere fact that the witness does not tell the story in court just as he told it out of court, or as he told it in court upon another occasion, ought not of itself to discredit him. As Lord Ellenborough

[9] Woodcock v. Bennett, 1 Cow. (N. Y.) 711; Reeves v. Poindexter, 8 Jones (Law) (N. Car.) 308; Rockford R. R. v. Hilmer, 72 Ill. 285; Chadwick v. Chadwick, 52 Mich. 545; Atlanta R. R. v. Johnson, 66 Ga. 259; Tesney v. State, 77 Ala. 33. See also, Cotton v. Willmar &c. R. Co., 99 Minn. 366, 109 N. W. 835, 116 Am. St. 422, 426 (citing 2 Elliott on Ev., § 969); Menard v. Boston &c. R. Co., 150 Mass. 386, 23 N. E. 214.

said: "Indeed, upon the reason of the thing, evidence, if it be heard again from the same witness, cannot be precisely the same; differences must necessarily arise from a varied recollection of the witnesses."[10] It is not strange that facts should be recalled to memory which at one time could not be recollected, nor is it strange that things once remembered may have been forgotten. Men's memories are, at best, treacherous and uncertain, and it is not always to be thought a mark of wickedness that at one time they recall what at another they cannot recollect.

Where a witness states facts on the witness stand omitted from his statement made out of court, the advocate who supports him will naturally endeavor to bring out some reason why the witness should recall and state what had been omitted, while opposing counsel will quite as naturally endeavor to make it appear that there is no good reason why the omission should be supplied. If a bad motive can be shown for supplying the omission, the testimony of the witness will, in all probability, be much shaken. On the other hand, if it can be shown that there is no bad motive influencing the witness to supply the omission, much will be done toward strengthening his testimony. If the witness does not recall facts stated out of court, then, clearly enough, the search on the one hand will be for some reason why it is not unnatural that he should forget them, and on the other the search will be for some reason why it is unnatural that he should forget them. In general, the attacking counsel will reap more profit by searching for the motive than by searching elsewhere, but it is by no means every case in which the search should be thus confined.[11]

Presumptions may be so employed as to add material strength to an argument. The advocate who fails to make skilful use

[10] The King v. Com'rs, 3 M. & S. 133-143.

[11] In concluding this branch of our immediate subject, it may be well to suggest that in commenting on testimony and determining how to treat the evidence in the address to the jury, works on psychology and the recent work of Moore on Facts, which gives the views of many courts and writers as to the different influences and matters that may affect the credibility of witnesses and the weight of the evidence, will be found useful and valuable.

of a presumption of fact is as unwise as the general who disdains to use entrenchments or fortifications near at hand. Presumptions, when well constructed and clearly presented, very often turn the scale. One must not expect to find ready-made presumptions that will fit every case, but, on the contrary, he must often construct them from the materials supplied by the evidence in the particular case, and make them snugly fit the point for which they are intended. The examples found in the books by no means exhaust the subject, although they very often supply the required presumption, and are always suggestive. It is a mistake to hunt for presumptions through the books, as precedents are hunted for, and he who pursues such a plan will not always reap much profit. A presumption of fact is, as Mr. Stephens says, "Simply an avowedly imperfect generalization, and this must, of course, be founded on experience."[12] Indeed, all proof, short of demonstration, is, at bottom, nothing more than a presumption. "Proof," said Erskine, "is nothing more than a presumption of a high order." If men did not act upon presumptions in the ordinary affairs of life, there would be little, if anything, done in this world.

In judicial proceedings presumptions are of controlling influence. Men are seldom conscious of the extent to which they are ruled by presumptions, for their influence is far-reaching. "We are," says Mr. Gladstone, "bound to act on the best presumption, whether that presumption happens to rest on something done by others, or on something we have done ourselves."[13] We must, indeed, act on presumptions, or seldom act at all. Jurors give credit to testimony because they presume it to be true, for it cannot be affirmed that they know it is true.

The term "presumption" is not, as ordinarily employed, a safe one for the advocate to use. While the thing the term is meant to describe, and does describe, is, in truth, very strong, yet, the term, as generally understood, denotes something feeble, and

[12] Liberality, Equality and Fraternity, 201. We are here, we say, to prevent misconception, dealing with presumptions of fact and not of law.

[13] Hill's Rhetoric, 208.

thus creates a false impression.[14] The shrewd advocate will not employ the term, but will substitute for it some other word, as, conclusion, inference, or judgment. He will construct and place before the jury presumptions, but he will not ordinarily give them their true name. It is not his fault that the name so often carries a false impression, but it will be his fault if he does not take measures to prevent that impression. A juror who is told that he must find that the plaintiff has a good case, because the presumption is that the witnesses told the truth, will not be so strongly influenced as he would be if he were told that the testimony proves the material points of the plaintiff's case. While it is very difficult to lay out the line between a conclusion or an inference of fact and a presumption of fact, it is very clear that a juror will be much less strongly impressed by using the former terms than by employing the latter term.

Presumptions of weight and value are those which are probable and plausible.[15] These qualities are given them by making it appear that they agree with knowledge derived from experience. A presumption supported by experience is a very strong element of proof. The advocate who cannot perceive and seize presumption loses, in many instances, a strong argument. "If you have the presumption on your side, and can but refute all the arguments that are brought against you, you have, for the present at least, gained a victory; but if you abandon this position by suffering the presumption to be forgotten, which is, in fact, leaving out one of, perhaps, your strongest arguments, you may appear to be making a feeble attack instead of a triumphant defense."[16] A searcher for arguments who overlooks presumption is not blessed with a clear, mental vision.

The advocate who brings into service a valid presumption puts his opponent in the position of an assailant, for the presumption preoccupies and fortifies the ground. Before the party who obtains the aid of the presumption can be defeated, his

[14] Devey's Logic, Book VI, Chap. II, § 1.

[15] See United States v. Sykes, 58 Fed. 1000, 1005; Withaup v. United States, 127 Fed. 530, 537, 62 C. C. A. 328.

[16] Whately's Rhetoric, Part I, Chap. III, § 2.

adversary must attack and overthrow the presumption. The burden of proof is thus cast upon the assailant, and if there be a point where he is weak the attack will be repulsed. The burden of overcoming a *prima facie* case made by a valid presumption is very often a heavy one; so heavy, indeed, that it causes utter defeat.

The facts receive force from the law. In order to secure a verdict, it is necessary to apply the law to the facts. It is true that there are some cases in which the question seems to be entirely one of fact; but this is so only in appearance, for in every case, no matter how simple, it is the law which awards a recovery or commands a defeat. In some cases, the law is so well settled, or so fully agreed upon, that the actual contest falls entirely on the facts, but there are other cases where the law is the sole subject of the dispute. In such cases, it is necessary to so present the law that the jury shall both understand its effect and yield to it. The law in civil cases comes from the court, but it is, nevertheless, often important for the advocate to clearly state it, and make plain its application to the facts. The court seldom does more than state the law and apply it in a general way, but the advocate must often do much more. It is necessary, in many instances, to persuade the jury of the justice of the rule of law insisted upon, since jurors are very reluctant to yield to what seems to them an unjust rule. In this work Erskine excelled. His presentation of the law to a jury was always masterly.

It is sometimes essential to show that, while a rule may work harshly in a particular case, a departure from it would lead to injustice in many cases. Again, it is often important to get before a jury the foundation upon which a rule rests, in order that their judgment may be controlled by the reason which gives life to the rule. In other cases it is important to show the policy of the law, to enlarge upon the good its strict enforcement will do, and to dwell upon the evil likely to follow a departure from it.

An ancient doctrine, long taught by the rhetorical writers, directs the advocate who has the law on his side to praise the law,

enjoin upon jurors the necessity of adhering to it, and warn them that their oath binds them to yield obedience to it without attempting "to set up a law unto themselves." The advocate who finds a rule of law sorely pressing him will naturally do what he can do to break its force, and this will sometimes lead him to attack the justice of the rule itself. If he can satisfy the jury that the rule is an unjust one he will have much less difficulty in persuading them that his case is not within it. If, in other words, he can set the minds of the jurors against the rule, they will be much easier persuaded that the rule has no application to the case before them. Jurors who are convinced of the injustice of a rule, or are induced to believe that it will operate harshly in the particular case, are almost sure to find some excuse for defeating its operation. Once they are persuaded that the rule will operate harshly or unjustly, they will be quick to seize upon some pretext, caring little for its value, to prevent the rule from controlling the case before them.[17]

A consideration of the consequences to which a verdict will lead often so influences the jury that it carries the verdict. An argument from consequences is always a strong one with jurors. Men, whether in the jury-box or elsewhere, yield readily to an argument which persuades them that evil will result from one course and good from another. Jurors who are persuaded that a man who has lost a leg or an arm will find his path through life a rough one unless money is at his command, will go to great lengths to make it easier by taking money from the man he charges with having caused his misfortune and giving it to him. If the party charged be a rich man, or a rich corpora-

[17] "If you have a case where the law is clearly on your side, but the facts and justice seem to be against you," said an old lawyer to his son, who was about to begin the practice of the law, "urge upon the jury the vast importance of sustaining the law. On the other hand, if the law is against you, or doubtful, and the facts show that your case is founded in justice, insist that justice be done though the heavens fall." "But," said the young man, "how shall I manage a case where both the law and the facts are dead against me?" "In that case," replied the old lawyer, "talk around it," and "the worse it is, the harder you pound the table," adds a modern commentator.

tion, it will be strange, indeed, if, right or wrong, the jury do not make him contribute something to make the injured man's life less rough and hard than they conceive it would be without money. It is true that in such cases sympathy for the sufferer exerts a great influence, but the consequences which the jurors conceive will result if the unfortunate man does not succeed exert a much greater. By adroitly and insidiously pointing out to a jury the evil that will result from a verdict against his client, the advocate often secures a verdict directly opposed to the law and the evidence. Erskine was one of the most skilful of advocates in employing the argument drawn from consequences, and, perhaps, in none of his addresses did he more effectively employ this argument than in his speech in behalf of Captain Baillie.

The advocate who should avowedly attempt to influence a jury by announcing that they must be governed by a consideration of the consequences to which a verdict against his client would lead would set the jury hard against his cause. Jurors are not willing to own, even to themselves, that a regard to consequences would swerve them from the line of duty, and they would resent, with uncomfortable heat, an avowed attempt to persuade them to forsake the path of duty. The prudent advocate will, therefore, be careful not to provoke this resentment. He will point out the consequences to which an adverse verdict will lead, but this he will do indirectly, and as if it were unpremeditated. He will not, as a general rule, hint that he hopes to influence them by directing attention to the consequences; much less will he avow that jurymen should be controlled by a consideration of the consequences that will flow from an adverse decision. He will make them see the consequences, but he will not even suggest to them that any other influence should operate upon their minds than that of the law and the evidence.

It is the business of the advocate to persuade as well as to convince. Conviction is a means, and a sure one, to persuasion. Convince the jurors that right and justice are with one party, and that party will, in the very great majority of cases, get the verdict. Persuasion attends conviction, for men convinced

of truth and right are persuaded. An appeal to the passions may sometimes assist in obtaining a verdict, but alone, and without the aid of conviction, it will accomplish very little. Some effort to produce conviction is essential in every forensic discourse, for jurors resent an open and avowed appeal to their passions. This is evident when it is brought to memory that men resent an attempt to take advantage of their weakness. An open and avowed appeal to their passions is regarded, and not unjustly, by most men, as an effort to profit by the weakness of human nature. Men esteem it no evidence of weakness to yield to conviction, but regard it as an evidence of weakness to yield to their emotions. The great advocates who defended Sickles, while in the main appealing to the emotions, covered their appeals with the cloak of argument. Prentiss, in his powerful appeal to the Kentucky jury, sought to convince, although in reality his great instrument was the appeal to the passions and prejudices of the jurors. A clumsy advocate may discard argument, but a skillful one never does. Argument and appeal may may be combined; the one must be open, the other concealed; the one must form part of every forensic discourse, the other may often be absent.

Pathetic appeals are powerful. Pathos arise out of the case, and the advocate who attempts to manufacture it will find himself the object of scorn, and not of admiration.[18] A statement of the facts is the genuine method of exciting compassion; all other methods are spurious. But it is not by a dry, bare statement of facts that sympathy is aroused or grief excited, but by softly and gently connecting them with incidents that go home to men's hearts. Indignation is aroused by depicting in strong colors the conduct of the person against whom the invective is directed. Sympathy for the weak against the strong is best excited by comparison. It is useless, worse than useless, indeed, for it is arrant folly, to attempt to move men by informing them in advance of what is to be done. An appeal that bears the

[18] "He whines and weeps, thinking to make me tender. If he were tender himself, the thing would be done." Meditations of a Parish Priest, 48.

appearance of labor or study is not effective.[19] Labor and study it may have, but labor and study it must not seem to have. A sudden outburst, coming with the moment and against an apparent effort to suppress it, is the power that sways men's hearts.[20] The pent-up sob that bursts from the heart of the mourner is infinitely more powerful than the long wailing. Grief that comes despite restraint most moves the heart. Grief that comes at the bidding seems theatrical, and what is theatrical jurors regard as spurious, and what they regard as spurious they treat with contempt. Nothing is so ridiculous as an abortive attempt to manufacture pathos. If the case is one where passion naturally arises, and the advocate has taken, as it is his sacred duty to do, the cause of his client to heart, then, if he be not an advocate utterly destitute of sensibility, his own heart will be his best teacher; that will not betray him into a false position; but if he follows any other guide he will be almost sure to bring himself into reproach as an imposter. One who feigns what he does not feel must be a consummate actor if he escapes rebuke, for, in the forum, men deal, or think they deal, with real things, and scout impatiently all that is hypocritical or theatrical.

Home-born words are the words of the emotions. Men deeply moved catch words heard at home, not those found in books. Real emotion breaks out in little words. There are words for all the passions. "Some are sweet as children's talk; others rich as a mother's answering back. The words which have universal power are those that have been keyed and chorded in the great orchestral chamber of the human heart. Some words touch as many notes at a stroke as when an organist strikes ten fingers upon a key-board. There are single words which contain life histories, and to hear them spoken is like the ringing of chimes."[21]

[19] Of S. S. Prentiss Judge J. G. Baldwin says: "In his loftiest flights all seemed natural and unpremeditated."

[20] "It is the soul within him that breaks out like lightning in the collied night." Noctes Ambrorianæ.

[21] Theodore Tilton's Introduction to Mrs. Browning's Poems.

RULES OF LAW.

1. Whenever there is a debatable question of fact to be submitted to the jury, either in a civil or criminal case, the parties have a right to be heard in argument, either in person or by counsel.

Sodousky v. McGee, 4 J. J. Marsh. (Ky.) 271; Cartright v. Klopton, 25 Ga. 85; Douglas v. Hill, 29 Kan. 527; Houck v. Gue, 80 Neb. 113, 46 N. W. 280; Wood's case, 7 Leigh. (Va.) 743. But it is held otherwise where the court directs a verdict fixing its nature and extent. Harrison v. Park, 1 J. J. Marsh. 170; Greidig v. Cole, 13 Neb. 39. And it is also held that a judge is not bound, even in a criminal case, to hear argument on a question of law where his opinion is so fixed as to render argument unavailing. Howell v. Commissioners, 5 Gratt. (Va.) 664-668.

2. The number of counsel to be heard and the order of argument are matters resting, to a great extent, in the sound discretion of the trial court. But where several defendants appear by separate counsel they will each be heard, unless their interests are similar, and in that case the court may require the selection of one counsel to be heard for all.

Sodousky v. McGee, 4 J. J. Marsh. (Ky.) 267. See also, Estate of Gird, 157 Cal. 534, 108 Pac. 499, 137 Am. St. 131.

3. The time to be occupied in argument may be limited by the court, both in civil and criminal cases, in the exercise of a sound discretion;[1] but manifest abuse of such discretion, to the injury of a party, may constitute error sufficient to reverse a cause upon appeal.[2]

[1] 9 Crim. L. Mag., 615; Trice v. Hannibal &c. R. Co., 35 Mo. 416; Dunlap v. Fox (Miss), 2 So. 169; State v. Hoyt, 47 Conn. 518, 36 Am. 89; State v. Collins, 70 N. Car. 241, 16 Am. 771; and see authorities cited in note, 775. *Contra,* Hall v. Wolff, 61 Iowa 559, 562.

[2] White v. People, 90 Ill. 117; Dille v. State, 34 Ohio St. 617; Cooley's Const. Lim., 336; Hunt v. State, 49 Ga. 255, 15 Am. 677; State v. Nyman, 55 Conn. 17, 10 Atl. 161.

For additional illustrations, both of a proper exercise of this discretion and of abuse thereof, see authorities cited in note to Williams

v. State, 27 Am. 412, 413; and in the leading article by Judge Thompson in 9 Crim. L. Mag., 616, 617.

4. Where counsel is refused the right to address the jury, or is unreasonably limited in time, he should object and except to the ruling of the trial court, and present the question for review in the appellate court by bill of exceptions.

Wilkins v. Anderson, 11 Pa. St. 399; Dille v. State, 34 Ohio St. 617, 32 Am. 395, 397; "The Right of Argument," 9 Crim. L. Mag., 617, 618.

5. As a general rule, counsel in argument must confine themselves to the facts brought out in evidence.

Proffat's Jury Tr., § 249; State v. Hamilton, 55 Mo. 520; Scripps v. Reilly, 35 Mich. 371, 24 Am. 575; Kaeine v. Trustees, 49 Wis. 371; Brow v. State, 103 Ind. 133, 2 N. E. 296. But they may, of course, draw proper inferences. People v. Stranch, 240 Ill. 60, 88 N. E. 155, 130 Am. St. 255. See also, Commonwealth v. People's Express Co., 201 Mass. 564, 88 N. E. 420, 131 Am. St. 416.

Thus, it is error and may be cause for a new trial to permit counsel over objection and exception, to state and comment upon facts pertinent to the issue but not in evidence. Brown v. Swineford, 44 Wis. 282, 28 Am. 582, 7 Cent. L. J., 208; Yoe v. People, 49 Ill. 410; Rolfe v. Rumford, 66 Me. 564. See also, Evans v. Town of Trenton, 112 Mo. 390, 20 S. W. 614; Bullard v. Boston &c. R. Co., 64 N. H. 27, 10 Am. St. 367, and note.

So it is improper for counsel to refer to facts not pertinent to the issue, but calculated to prejudice the case. Farman v. Lauman, 73 Ind. 568; State v. Degonia, 69 Mo. 485; Ferguson v. State, 49 Ind. 33; Coble v. Coble, 79 N. Car. 589, 28 Am. 338. See also, McDonald v. People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. 547; Graves v. United States, 150 U. S. 118, 37 L. Ed. 1022, 37 Cent. Law Jour., 458; Neff v. City of Cameron, 213 Mo. 350, 111 S. W. 1139, 127 Am. St. 606.

For additional cases illustrating the application of this rule, see authorities cited in article on "Misconduct of Counsel in Argument," 14 Cent. L. J., 406.

6. While the argument should be confined in essential matters to the record and the evidence, yet, on the other hand, reasonable freedom of debate and illustration should be allowed;

and as the whole matter rests largely in the discretion of the trial court, the appellate court will not interfere unless that discretion has been abused in a manner likely to have prejudiced the complaining party.

Combs v. State, 75 Ind. 215; Shular v. State, 105 Ind. 289, 4 N. E. 870; Baker v. State, 69 Wis. 32, 33 N. W. 52; Gulf &c. R. Co. v. Witte, 68 Tex. 295, 4 S. W. 490. See generally, the elaborate note in 46 L. R. A. 641.

7. In the United States courts, and in the courts of probably a majority of the states, counsel are not permitted to argue to the jury questions of law already decided by the court adversely, even in criminal cases;[1] but in a few states it is held that counsel have a right to argue the law to the jury in criminal cases, although not, as a rule, in civil cases.[2]

[1] Commonwealth v. Zimmerman, 1 Cranch (C. C.) (U. S.) 47; United States v. Riley, 5 Blatchf. (U. S.) 204, 207; State v. Anderson, 44 Cal. 65, 70; Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. 51, and note. And see article on "The Right of Argument," 9 Crim. L. Mag., 611, and authorities therein cited.

[2] See 9 Crim. L. Mag., 632, 633, and authorities cited; I Thomp. Tr., § 943.

8. Where the right to argue the law to the jury exists, counsel may read it to them from the books of the law,[1] within reasonable limits.[2]

[1] Stout v. State, 96 Ind. 407; Commonwealth v. Austin, 7 Gray (Mass.) 51; McMath v. State, 55 Ga. 304, 308; Gilberson v. Miller &c. Co., 4 Utah 46, 5 Pac. 699.

[2] Commonwealth v. Murphy, 10 Gray (Mass.) 1; Mayfield v. Colton, 37 Tex. 229, 232.

But law books cannot be read for the purpose of getting facts before the jury not regularly offered and admitted in evidence. Evansville v. Walter, 86 Ind. 414; Dempsey v. State, 3 Tex. App. 439; Laughlin v. Street Ry. Co., 80 Mich. 154, 44 N. W. 1049; Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349.

Whether counsel can read medical and scientific books to the jury or not is a vexed question. Probably the true rule is that this cannot be done for the purpose of getting facts before them, but can be done so far as the reasoning or mere agument is concerned. See

leading article by Mr. Moak in 24 Alb. L. J., 266, and note to Ashworth v. Kittridge, 59 Am. Dec. 180; 2 Elliott Gen. Pr., § 694.

9. Whether, according to the law and practice of any particular jurisdiction, the law can be read and argued to the jury or not, permitting counsel to do so will not be reversible error where the law so read or argued is correct and applicable to the case, and not prejudicial to the complaining party.

Johnson v. State, 59 Ga. 142.

10. The closing argument should, in general, be confined to the grounds stated and authorities cited or points of law stated in the opening.

Wynn v. Lee, 5 Ga. 217; Cutler v. Estate of Thomas, 24 Vt. 647. But, of course, it is proper to meet and answer the points made by counsel for the other party in his intervening argument.

To make the violation of this rule available error on appeal it is held that if the court refuses to permit the new matter to be answered under a statute giving that right, an exception must be taken, and the court must certify that it was new matter, or the entire opening argument must be set out, at least in substance, so that the supreme court may know that the new matter was introduced in the closing argument. Morrison v. State, 76 Ind. 335.

11. Wherever misconduct of counsel occurs in argument an objection should be made, and exception to the ruling of the court thereon taken at the time and brought into the record by bill of exceptions.

Choen v. State, 85 Ind. 209; Buscher v. Scully, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37; Bradshaw v. State, 17 Neb. 147, 22 N. W. 361; Chandler v. Thompson, 30 Fed. 38; note in 46 L. R. A. 641.

Counsel has a right to interpose during the argument of adverse counsel to make such objection. Long v. State, 12 Ga. 293-330; Morrison v. State, 76 Ind. 335.

12. Where the court, over objection, has erroneously permitted counsel to persist in such misconduct, an instruction to the jury that they should disregard or not consider such mat-

ters will not, as a general rule, cure the error.[1] But where the court stops counsel and does all in its power to render the improper remarks ineffective, the misconduct is usually cured, or at least cannot be taken advantage of unless the adverse party moves to set aside the jury or takes other proper steps to secure a fair trial.[2]

[1] Scripps v. Reilly, 35 Mich. 371, 24 Am. 575; Forsyth v. Cothran, 61 Ga. 278; Tucker v. Henniker, 41 N. H. 317; School Town of Rochester v. Shaw, 100 Ind. 268. *Contra,* Kennedy v. People, 40 Ill. 489. Misstatements as to law may be cured by instructions. Proctor v. DeCamp, 83 Ind. 559.

[2] Maybin v. Webster, 8 Ind. App. 547, 35 N. E. 194; Grubbs v. State, 117 Ind. 277, 20 N. E. 257; State v. Braswell, 82 N. Car. 693; Bonner v. Glenn, 79 Tex. 531, 15 S. W. 572. See also, generally, the note in 46 L. R. A. 641. Compare also, Southern Ind. R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589.

CHAPTER XI.

ARGUMENT OF QUESTIONS OF LAW.

"No man alone, with all his uttermost labors, nor all the actors in them, out of a court of justice, can attain unto a right decision, nor in a court of justice, without a solemn argument, where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right."—*Sir Edward Coke.*

"In the argument of these cases, precision of language, especially in the statement of legal propositions, is of far more importance than beautiful figures of speech, and is to be cultivated rather than a showy style. A legal point well stated is half argued."—*Thomas M. Cooley.*

"And the power of clear statement is the great power at the bar."—*Daniel Webster.*

"To the bench, his most powerful instrument of conviction is profound and accurate deduction. To the jury, his most effectual weapon is copious elucidation. His address to the court should be concise, without obscurity; to the jury, copious, without confusion."—*John Quincy Adams.*

"The great minds are those with a wide span, which couple truths related to, but far removed from, each other."—*The Autocrat of the Breakfast Table.*

"An advocate who would obtain a reputation for truth with the judges should never advance an important fact without proof in hand; for should the adverse party contest it, he will find himself engaged in a perilous struggle, unless he has acquired a sufficient authority at court to inspire belief with the judges; a young advocate should never risk it."—*History of the French Bar.*

An argument should be "a reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great direction and instruction the studious hearers." This it ought to be, but this it cannot be, unless with care and skill prepared, and with dignity and earnestness delivered. A cause that is

not of enough importance to call into exercise care and skill in the preparation of the argument, both in the matter and in the diction, is not worth the attention of court or counsel. But cases are not to be weighed by the pecuniary interests involved. Cases involving trifling amounts sometimes present important questions, and the counsel who undertakes such causes owes it to his profession and to the court to prepare his argument with care, and to present it forcibly and clearly. This the court has a right to expect, and this professional honor ought to secure.

One may almost venture to assert that no man ever did make, or ever can make, a really good argument on questions of law without close thought and profound study. It is not always difficult to make a passably fair argument on facts, where the advocate is familiar with them, without preparation, but with respect to the argument on questions of law it is far otherwise. Without preparation, one may halt and blunder through an hour's speech, but his effort ought not to be dignified with the title of argument.

Questions of law cannot be dealt with by inspiration, if, indeed, any question can be justly dealt with in that way. "My dear fellow," said Curran to Phillips, "the day of inspiration has gone by," and if Curran could not speak by inspiration one may well wonder if ever a man lived that could do so. Certainly, no man more carefully prepared than did Demosthenes, and the moderns are not much less scrupulous and carefull in the work of preparation. Brougham's speeches were written and rewritten, and so were many of the speeches of Erskine. Pinkney prepared with elaborate care, and so did the greatest of all American advocates, Daniel Webster. Choate was incessantly at work, pen in hand, from the time the cause was taken up until its end. Night and day were devoted to study.[1] In his diary he wrote: "A wide and anxious survey of that art and that science teaches me that careful, constant writing is the parent of ripe speech. It has no other. But that writing must always be

[1] It is said of him that he rose from his bed in the middle of the night to serve a notice.

rhetorical writing—that is, such as might, in some parts of a speech, be uttered to a listening audience."

Naturalness is the chief virtue of all speaking; but naturalness does not mean that there shall be neither elegance nor polish in a forensic discourse; on the contrary, naturalness implies that the matter and the diction shall be suited to the place and the occasion. A style that lacks elegance is not natural where grave questions of law are to be discussed before men learned in the law. Erskine's style is, in the strictest sense, elegant, and yet no style can be more natural. Nor is there reason for asserting that study gives the argument a labored appearance or impairs its force, for the truth is that judicious study creates both simplicity and naturalness. Webster, whose style is the perfection of simplicity and strength, gave more earnest and constant study to his style than any other American advocate, except, possibly, Rufus Choate.

The man who contents himself with arguing questions in the courts as he would talk at the fireside will meet many defeats and win few victories. Both the subject and the method of discussing it will bear deep and close study, and no one need fear impairing either force or the clearness of his argument by doing all he can to find the best words the language contains, and so arranging them that grace and elegance may adorn his discourse. Too much pains cannot be taken with this work, unless the desire to polish and adorn leads the advocate the neglect the body and substance of his argument. First, always, in importance is the matter of the argument; if that be strong, elegance and grace in its apparel will make its strength more noticeable, and its effect more marked.

An argument implies two things: that the court is willing to be informed and instructed, and that the advocate has given the particular cause such special study that he is able to impart information and instruction.[2] The advocate in assuming to discuss the questions of law assumes no knowledge superior to that of the court, except the special knowledge acquired by a

[2] See also, "Suggestions to Lawyers" in Law Notes for December, 1910.

study of the particular cause he undertakes to argue. If he has not so studied the cause he comes dangerously near being an imposter. But no great lawyer ever approached the danger line, for he, we may be sure, came to the argument armed at every point by careful preparation. The judge knows, or ought to know, if he is worthy the place he occupies, that the special study has fitted the advocate to instruct him in the law of the case in hearing; and he will listen, not only with patience, but with pleasure. If, however, it appears, as it sometimes does appear, that the advocate knows little of his case, then, though the judge may hear with patience, it will not be with pleasure. No man, judge or layman, listens very kindly to instruction from one not better informed than he is in the matter in which he who speaks professes to give him instruction. Judges, in most cases, receive instruction gratefully and gladly, for it not only lightens their labors, but it gives them confidence in the justice of the judgment they must pronounce. No advocate, young or old, need fear rebuke from a just judge, if he shows that he has given the cause thorough study, and can intelligently impart the knowledge which he acquired by that study.

As a general rule, there is neither necessity nor propriety in dwelling on elementary principles, for with these the court may be presumed to be familiar. It is enough to recall them to the memory of the court by a brief mention; but, though brief, it should be forcible and clear. Possibly there may be judges who need instruction in familiar elementary principles, but, if there be, surely they will not know that the principles are elementary; and it would be a great piece of stupidity on the part of the advocate to proclaim that the principles are so elementary that every lawyer is presumed to be familiar with them. The truth is, the law is a vast system of principles, and it is not always easy to say just what may and what may not be considered rudimentary.

It does not follow because principles or rules are found in a text-book that they are so elemental that a judge ought to be ashamed if he is not familiar with them. The ablest judges of the courts of England and America refer to text-books of ap-

proved authority for the statement of principles that, in a restricted sense, at least, are elementary, so that an advocate need not have any fear of offending by calling text-writers to his assistance. There are, however, some principles so plainly elementary that it would be folly to attempt to instruct the judge in them, unless, indeed, it be some such judge as Mr. Bishop depicts. But even if the judge should be as ignorant as Mr. Bishop describes him, there is little necessity for strategy, except in so far as a straightforward assertion of the principle, with reference to authorities supporting it, and silence as to its being an elemental principle, can be deemed strategy. The author to whom we have just referred favors a much more elaborate strategic system, for, in speaking of the advocate who undertakes to give instructions to a judge, he says: "If, in his argument, he goes to work to give the instruction directly, he will be met by the intimation that the court is presumed to know something. He has offended his judge and lost his case; and, what is worse, he has injured his prospects for all the cases which will follow. In such circumstances, the lawyer must either instruct the judicial understanding by stratagem or lose his case. Now, stratagem which can be pointed out in advance is no stratagem. Here, then, is the opportunity for the exercise of one of those mental qualities which, in war, enters largely into the composition of the great general. And the truly great lawyer, in the strategic sense, will find out a way, in almost every instance in which the matter does not come on for final disposition too suddenly. It may be by presenting some feigned point which will give occasion to exhibit the principle, or by some incidental comments upon some decision; or, if the lawyer is a little less nice and scrupulous in his mode of doing things, some book may, in a friendly way, be lent to the judge, perhaps through the agency of a third person, with some observation which will lead him to read the desired part. But the ways of crookedness are too numerous to be pointed out in detail."[8] A very bad sort of judge the learned author must have had in mind when he penned these words; but if there be such judges, his

[8] Criminal Procedure (1st ed.), § 1054.

advice may be good, and the strategic course he points out may be necessary. But, happily, there are not many such judges.

The general rule is that judges desire information and instruction, and that no stratagem need be resorted to in order to induce them to receive it. Judges, of course, are only men, and, as men, it is fair to presume that they will not listen so attentively to one who, with show of his own superiority, arrogantly assumes the part of the pedagogue. There need, however, be little fear of giving offense by going directly to the work of instructing and informing them, although it might not be quite so pleasant if the attempt should be made to accomplish the work by strategy. Strategy such as Mr. Bishop recommends would deceive only a very weak man, even if it would do so much as that. In dealing with the court it is, in general, better to fight openly and manfully, and use no stratagems. If, however, it be necessary to resort to strategy it is better to adopt that approved by a French advocate than that recommended by Mr. Bishop. The strategy recommended by the former is, to assume and state the principle as a familiar elementary one, and assert that it is stated, not for the mere purpose of placing it before the judge, but for the purpose of giving it a proper application to the case in judgment.[4] It is, indeed, very often necessary to state a principle, be it ever so elementary and familiar, in order that a just application may be made of it to the particular case, and there is very little, if any, strategy in pursuing the course indicated by the French advocate.

Oral arguments are, for many and manifest reasons, vastly superior to written arguments. What is heard creates a much more decided impression than what is read. A drama represented on the stage is much more impressive that when read. Voice and gesture give force and emphasis. Points are more forcibly and more distinctly presented to the mind by an oral argument than by a written brief. The collision on points of difference is more marked, and the agreement on points conceded more noticeable, in an oral argument than in a written discussion. A thinking judge can, by questions courteously asked, elicit

[4] Profession D'Avocat, Vol. I, p. 510.

information on obscure points that else might escape unnoticed.[5]

The advocate who prepares for an oral argument will, if he does his duty, get a deeper insight into his case and better present it to the court than if he did no more than write a brief. But a written brief should in every case be the foundation of all oral argument. Webster wrote much, Choate wrote more, and Erskine wrote with infinite care. It is said of Erskine that he not only prepared his matter with scrupulous care and studied his words with unremitting vigilance, but that, before addressing court or jury, he practiced in front of a mirror.

A written brief makes the argument exact and logical, but a spoken argument gives it life and vigor. A brief is valuable as an accessory, but it is no adequate substitute for an oral argument. The oral argument is needed to arouse and stir the mind of the judge; a brief is needed to refresh his memory. Reference to authorities should form an essential part of a brief; principles and facts should constitute the great body of the oral argument. Courts find, among many other advantages, this benefit from an oral argument: counsel will adduce few trifling argument, for such things will not bear the face of day, and oral arguments are to them as the face of day.

In the appellate court every important case should be orally argued, and a case worthy of appeal may be presumed to be important. Judge Dillon justly says: "As a means of enabling the court to understand the exact case brought thither for its judgment, as a means of eliciting the very truth, both of law and fact, there is no substitute for oral argument."[6] No pressure of business can excuse the court from hearing, nor the advocate from presenting, the case by spoken rather than by written words, though it may make it the duty of the court to compel counsel to shorten their arguments.

Prolix legal arguments indicate with much certainty one

[5] Questions courteously asked—and a just judge will not ask discourteous ones—are really an aid to counsel. The French code, however, prohibits interruptions. History of the French Bar, 176.

[6] 19 Am. L. Review, 19.

of two things: lack of ability, or want of study.[7] Study, and close study, is required to make a good argument, and good arguments are neither long nor tedious. A man who has neither the industry nor the ability to condense his argument is not entitled to a very attentive hearing. Time, study, industry and talent are required to make short arguments, but none of these things are required to construct a long and dull speech. Most men can talk, and talk much, but few men can make a legal argument.

There are, to be sure, complex cases, involving intricate facts and many questions of law, which require protracted discussion, and in such cases, an argument consuming time is not necessarily amenable to censure; it may, however, be so protracted as to merit criticism as well as to impair its force. "Say what you have to say and then sit down,"[8] is an old aphorism among advocates, and "age has not staled its virtues." It is true in advocacy, as in mechanics, that the longer the chain the greater the probability of a broken or defective link. It is a mistake, therefore, to suppose that a forensic discourse is made strong by a great number of arguments; on the contrary, the greater the number the more danger there is of weak ones impairing the strong ones. An advocate who musters a great number of arguments will almost certainly get among them as sorry material as Falstaff did among his recruits.

The makers of long speeches are generally the losers of cases.[9] Judge Miller assigns a high place to Benjamin R. Curtis, and says that his arguments seldom occupied more than forty minutes, and never more than an hour.[10] Of him, and of another learned advocate, Judge Bradley writes: "The finest exhibitions of legal eloquence to which it has been my fortune to listen have been made by the late George Wood, of New

[7] Profession D'Avocat, Vol. I, p. 510.

[8] 24 Albany L. J., 40. It is worth much to a lawyer to have it said of him by the court what the father of equity said to Lord Somers: "You will not take up my time."

[9] "Length of saying makes languor of hearing."

[10] Address before Iowa Bar Association.

York, and Judge B. R. Curtis. Their arguments filled the mind, the ear, and the sense of fitness and good taste. And of the two, I always thought the style of George Wood the more admirable. It was chaste, yet rich in choice legal diction, pervaded with the odor of jurisprudence, as parchments with the sandal-wood in which they are kept, and conveying the impression that it was the law itself, and not an argument upon the law, that the advocate was unfolding."[11] It need not be more than suggested to those who read the opinions of these two great members of our highest federal court that two abler critics of forensic eloquence there are not in the land.

"Reason," says Mr. Irving Browne, "is a safer guide for courts of justice than eloquence."[12] This is true if we assign to the word "eloquence" the meaning ordinarily attributed to it, but in a court of justice there is no true eloquence without reason. Reason is what the court seeks, and a discourse addressed to a court is powerful when its spirit is reason; and where there is power there is eloquence, though there be neither the flowers of rhetoric nor the rhythm of well-rounded periods. Mr. Browne's condemnation of spurious eloquence called forth an approving letter from Judge Bradley, in which he quoted from Lord Auckland this forcible statement: "Plain sense, delivered in accurate expression, with a warm and graceful articulation, is the true eloquence of law."[13] Genuine embellishment does not impair the force of an argument, nor cloud the reason which gives it vigor. The error is in mistaking the true for the false. Tinsel is mistaken for the real gems, and instead of ornamenting and illustrating a discourse it deforms it. Many of the extracts given in books intended for students are composed of

[11] 22 Albany Law Journal, 439. Baron Alderson said: "This is the secret of getting on fast; namely, discarding all fudge and nonsense, and coming to the real point."

[12] 22 Albany L. J., 381.

[13] Ibid, 439. "The soul of all argument is eloquence, but above all, that eloquence which consists more in the force of reasoning than in the flowers of elocution."—*Letter of Camus in Dupin's Profession D'Avocat, Vol. I, p. 509.*

mere fustian, as much unlike real eloquence as the leaden pebble of the murky stream is unlike the real diamond.

Even in the discussions of abstruse questions of law, similes and metaphors are not out of place. The field of discussion need not be barren of all things save bare facts and dry rules. These are the essential elements, but illustrations and examples add life and vigor to the reasoning. Many abstract principles of law may be set in a clearer light by an illustration than by bare argument. No argument could make clearer the evils of an *ex post facto* law than Lord Digby's illustration given in his speech in behalf of the ill-starred Earl of Strafford: "Let the mark," said Lord Digby, "be set on the door where the plague is, and then let him who will enter, die."

Bacon adorns his discussions of matters of law with beautiful and chaste figures. Thus, he says: "Judgments are the anchors of the law, as the laws are the anchors of the states."[14] At another place he says, "For the rule, like the magnetic needle, does not make, but indicates, the law."[15] In a somewhat bolder strain he says, of preferring modern decisions to old ones, "For examples, like waters, are wholesomest in running streams."[16] His fierce and inveterate enemy, Sir Edward Coke, although far his inferior in imagination and learning, often employs bold and striking figures of speech. One of Erskine's most admired passages is the highest type of rhetorical illustration, and was employed in the discussion of a matter of law. His great argument before the Court of King's Bench, on the rights of juries, abounds in the finest, and yet boldest, figures of speech. Blended with the discussion of dry rules and precedents in the speech in defense of Stockdale were the richest ornaments of rhetoric. The argument of Jeremiah S. Black before the Supreme Court of the United States, in Milligan's case, abounds in tropes and figures. William Wirt was not less sparing of ornament in his argument in the case of Gibbons against Saunders; nor was Judge Stanley Matthews in the Cincinnati Bible case. Nor

[14] Advancement of Learning, Book VIII, Chap. III, § 73.
[15] Ibid, § 85.
[16] Ibid, § 28.

have the courts in solemn opinions hesitated to employ the graces of rhetoric. Thoughts expressed in language both strong and beautiful are found in many judicial opinions, and it is the thoughts that are thus expressed that the mind most strongly grasps, and that linger longest in the memory. If proof of this be needed, let the lawyer make the effort to recall principles stated by the judges, and he will find ample proof, for first into his mind will come those which the judges have stated in graceful and elegant language.

"We ought to consider," writes Quintilian, "before everything else, of what nature the cause is, what is the question in it, and what is to be maintained or refuted." Time has not diminished the force of these words. The advice they convey is, in truth, more important to the advocates of our time than it was to those of Rome. Modern advocates are confined within much narrower limits than were the ancient advocates, for now the record sets bounds which they may not pass. A field is marked out and inclosed, and within it their work must be done. Fields into which Cicero and other advocates of his time entered are forbidden grounds to the advocates of our age. The lamp-smoked orations of Cicero would sound strange to the ears of modern judges, and the advocate who should attempt to imitate him in his wide sweep into the lives and conduct of men would find himself sternly checked and admonished to keep within the record. Our practical methods may have curbed the flights of eloquence, but they have compensated for it in full measure by holding advocates down to the real business and to the real controversy.

As the record sets bounds to the argument of questions of law, it is of great importance for the advocate to know, before everything else, the nature of his case. This knowledge he must get from the record, and by the record. A thorough acquaintance with the record is essential to the advocate, but it is not always necessary that he should communicate this knowledge to the court in full. He must, however, clearly and distinctly communicate so much of the record to the court as will enable it to distinctly apprehend the nature of the case and the ques-

tions presented. At the outset, the nature of the case must be made known to the court without confusion, and the questions presented without obscurity. This cannot be done by one who is himself compelled to read from the record. One who does not know the nature of the case and the character of the questions well enough to present them without reading has slender claims to a respectful hearing. This is, in general, true, though there are cases, as, for instance, where the very words of a pleading, or of a writing, are the governing factors of the controversy, which may be justly deemed exceptions to the general rule. So much of the record, and so much only, as is necessary to enable the court to fully and clearly comprehend the question, should be stated, for irrelevant and unnecessary matter clogs the statement and makes it obscure. The facts should be trimmed down so that no immaterial ones will obstruct the view of those that rule the controversy. To clearly and adequately present the questions, it is necessary to state the facts out of which they emerge, the manner in which they arise, and their specific character. No argument of a question of law can be effectively made without a concise statement of the facts, for without the facts the speaker deals with mere abstractions, and abstractions are little else than phantoms. A statement of facts well made is the best of all foundations for a legal argument. Advocates often err in treating this part of the work in a careless and dull method, and the error is a grievous one. The work is not as easy as many suppose. On the contrary, he who can state facts and avoid superfluous details on the one hand, and obscurity from undue brevity on the other, is a skillful master of his craft.

The foundation having been laid by a statement of the nature of the case, of the facts, and the manner in which the questions arise, then the questions should be specifically stated. The statement of the questions should never be prolix, but yet should be so full as to clearly mark and bound them. "Distinctness," says Blair, "is a capital property in speaking at the bar. This should be shown chiefly in two things: first, in stating the question, in showing clearly what is the point in debate; what we

admit, what we deny; and where the line begins between us and the adverse party." The questions as they arise should be fenced off by clear, strong words, so that each question shall come clearly and distinctly into view.[17] Obscurity in stating the questions will cloud the whole argument, for, as the discussion progresses in a case where the start is made from an obscurely stated question, the darkness will increase with each step of the argument. Care bestowed in framing the statement of questions will be well compensated by the increase in power and distinctness. Not an unnecessary word should be employed, nor a needed one omitted. The statement should be crystallized into density and clearness. Erskine's great argument on the rights of juries is a model in this respect, and to his care in stating the questions it owes much of its power.

Each question should stand out as a prominent point, and around it arguments and illustrations should be clustered. Step by step each question should be taken up and discussed. Have done, and completely done, with one question before proceeding to another. The questions should determine the principle or division; each division should be complete in itself, and each argument assigned to its proper place in its appropriate division. A well-designed plan of division contributes very much to the force and distinctness of a legal argument. Some principle should be taken as the basis of every question, and this principle should rule the division with despotic power, exacting strict obedience along the entire line of the argument. Cross-divisions break the force of all arguments, especially those on questions of law. Without a settled, definite division, carefully thought out and determinedly adhered to, an advocate will be more fortunate than deserving if he does not get bewildered and lost in the dreary maze. Discussions of questions arising in an abstruse science, such as the law, cannot be strong, nor can they be clear, if a wrong principle of division is adopted, or if irrelevant cross-divisions are permitted to creep in to perplex both speaker and listener. Each division, we repeat,

[17] "Hearers are never so much fatigued," writes Mr. Ruskin in his King's Treasures, "as by a speaker who gives them no clew to his subject."

must be governed by a single principle. The subdivisions must be subordinated to the ruling principle, and must, when taken together, exhaust the subject, but should do no more. No crooked paths must be laid out by cross-divisions. From the main path of the argument there should be no departure, whatever temptations spring up along the way.[18]

Brevity, and strength and clearness, as well, will be secured by tersely stating the controlling propositions, and arguing the question presented by each proposition as if it were substantially an independent one. There is a class of dull speakers who, in utter disregard of the principles of division and partition, or else in ignorance of them, blend all parts of a discourse in a confused and dreary mass. Speakers of that class pursue a course the very opposite of that adopted by the strong speaker, who lays out the points and speaks to them. A disregard of the principle of division not only makes a discourse vexatiously tedious, but it also weakens it by smothering arguments that if well presented would be strong. It is always well to write out, and with scrupulous care, the principal propositions; and it is often expedient to do as Erskine did in his great discussion of the rights of juries—place the proposition in the hands of the judges before the argument opens.

There is another class of dull speakers who err in the opposite direction. Speakers of this class so multiply the subdivisions of a discourse as to lengthen it beyond all reason, unmindful of the fact that by their minute subdivisions they are chopping what valid arguments they have so fine that they cannot be seen. The mistake such speakers make is almost as great as that of those who give no heed at all to the principles of division. They are led into this error in most cases by a failure to discriminate between the controlling propositions and the subsidiary matters. They overload with details, and give to minor matters positions as conspicuous as those assigned to important ones. They forget, what it is important always to remember, that the points of the case are seldom many, and that it is only the points that require discussion. As the points of the case are few in number,

[18] Sir William Hamilton well discusses this subject. Logic, Lec. 25.

and as they control the frame and course of an argument, it is evident that many divisions are not required. By securing and fixing the points in the mind forensic discourses are condensed into strength. Pointless speeches are sure to be long and tedious, and quite as sure to be feeble and lifeless.

It is an indication of vanity and weakness, not of sense and strength, to pretend to know the law without going to the books.[19] It is both expedient and proper to refer the court to authorities, unless, indeed, the question is a familiar elementary one; and he would be a shallow judge who should take offense at counsel for citing authorities. To be sure, the work may be overdone, and authority piled on authority without reason or excuse.[20] A few well selected and clearly presented authorities are better than a multiude not clearly discussed nor methodically arranged.

The law of a case is presented by stating and enforcing the ruling points of the case, for points rule cases. The points of law contained in the books are, it is not entirely extravagant to say, almost as countless as the stars. "In a library of only five hundred volumes, Mr. Park estimates that there are probably not less than two million six hundred twenty-five thousand points; and Mr. Preston, in his recent learned treatise on the Law of Merger, computes that his volume contains at least three thousand propositions on subjects of daily occurrence."[21] These points, as we have elsewhere said, arise in an immense number of complications and combinations, and while it is possible to

[19] George the Third said to Mr. Justice Park: "It is wonderful to think that this little head contains the whole law of England." "Not so, sire," replied the judge, "it but contains the knowledge where the law may be found."

Coke was more pretentious, for he said: "If I am asked a question of common law, I should be ashamed if I could not immediately answer it; but if am asked a question of statute law, I should be ashamed to answer it without referring to the statute book."

[20] An overload of authorities Milton calls "a paroxysm of citations."

[21] Hoffman's Course of Legal Study (2d ed.), XIII.

know the fundamental principles[22] of the law without reference to the books, it is not possible to know all the points in the vast system of jurisprudence without studying, as each new case arises, the decisions, "which are not the sudden fancies or raw conceits of a few men," but are "grounded upon the clear evidence of reason, and upon the advisement of learned men, excelling in wisdom and famous in the law."[23] It is, therefore, no reproach to any lawyer, nor to any judge, that he cannot always discover or apply the points of law to the new case without consulting the books. It is, however, a stinging reproach to one who assumes the office of advocate or judge not to know where to look for the points of law, or not to recognize them when discovered. A man who knows nothing of minerals might pick up a piece of quartz laden with gold and cast it away in utter ignorance of its value, but a man knowing for what he searched would value it at its true worth, and, it may be, so use it as to lead him to a mine of gold. So, an unlearned lawyer would neither know where to search nor what he found, even though he should really pick up a golden point. A "working lawyer"[24] may not know all the points, but he will know where to look for them, and what they are when he sees them.

Courts are not influenced by pointless speeches. A speech without points, however elegant the language or rich the ornamentation, will be heard with indifference and passed without approval. Courts want, we venture to assume, the points stated and argued. Learning is valued if it lights up the points of the case; but if it is paraded for mere show, it will barely get credit for its abstract value, if, indeed, it gets any credit at all. Random firing will not be effective. The points to be supported and the points to be assailed, clearly perceived and conspicuously set up, will give direction and aim to the shafts of the

[22] "But I could never see in any author what a fundamental law signifieth." The Leviathan, Part II, Chap. XXVI.

[23] Edward Bulstrode. Dedicatory Epistle to Vol. II of Reports.

[24] "Your great working lawyer has two spacious stories: his mind is clear, because his mental floors are large, and he has room to arrange his thoughts so he can get at them—facts below, principles above, and all in ordered series." The Poet at the Breakfast Table, 50.

disputants, and, wanting this, they will fly wild. Perhaps nothing more strongly marks a great trial lawyer than the quickness and certainty with which he sees and grasps the points of his case. The indifferent trial lawyer is especially weak in this respect. It has been, again and again, said of such a lawyer, that "he did not see the point"; said so often, indeed, that an expressive legal phrase has degenerated into a low colloquilism.

A great part of almost every argument addressed to a court upon questions of law consists of a discussion of judicial decisions. We have discussed the method of investigating questions of law, and much that we have said applies to the work of investigating cases for the purpose of discussing them in the argument to the court.[25] In the investigation of the adjudged cases, for the purpose of ascertaining the law of the case, the primary object is to inform and convice the mind of the investigator; but in investigating the cases for the purpose of presenting them in argument as proofs or authority there is an additional purpose—that of so presenting them that they will produce conviction in the mind of the court. It would be of no great practical benefit for the advocate to inform himself as to the law of the case, unless he is able to clearly and strongly present that information to the judge. If he can not communicate the knowledge he has acquired, it might quite as well be sealed up in the books as in his own mind. It is doubtless true, that in prosecuting the search for the law of the case much is accomplished in the way of prepartion for the argument of the questions of law; but, as the principal object of that search is to convince the judgment and inform the mind of the advocate himself, it is not all that is required.

Before argument, there should be a thorough study of the decisions. This study should be prosecuted with a determined purpose to so completely engraft the principles asserted by them in the mind as that they can be certainly and effectively made use of as means of producing conviction. It is manifest that to attain this object the advocate must know whether the case is strong, and, if strong, why it is strong; and this can not be

[25] *Ante*, Book I, Chap. II.

known without knowing what it decides, why it so decides, what facts it is based on, and on what principles it rests.[26] With this knowledge clearly secured, and firmly held, there need be little fear of failing to present the questions strongly and clearly; without it there is little hope of doing the work creditably or successfully.

A judicial decision is strong if it stands on principle. Principle gives it life and force. It is the office of judicial decisions to supply evidences of the law, but, in the true sense of the term, they do not make law. "Law," said Demosthenes, "is definite, and the same to all." This is true of the fundamental principles of justice, for they apply to all alike. No one can adequately understand the force and effect of a judicial decision unless he obtains a knowledge of the ruling principle; but when he does obtain this, he is master of the decision, and may readily apply it, for the principle is the law, and the "law is definite, and the same to all." The principle supplies the major premise, and without such a premise there can be no valid deductive reasoning, although it is seldom necessary to state the premise in full. Force and clearness are, indeed, often obtained by fully expressing the major premise, but it is done, generally, at the expense of time and words. Whether implicit in the thought or expressed in the words, this premise must exist, and must be fully understood by the advocate who attacks a decision or seeks its support.

No certain or intelligible application can be made of one case to another unless the principle is clearly apprehended, or both cases are precisely alike. "And the only way," says Mr. Bishop. "in which it is possible for one decision to be a guide to another involving facts differing is to trace the decision to its principle, and thence to pass downward to the new facts and inquire whether or not they are within the same principle."[27]

To discover, and so fix in mind that it can be clearly presented in argument, the principle of a judicial decision, a rigid analysis must be made. The two great elements, law and fact, must be

[26] See 1 Green Bag 549.
[27] 22 Am. L. Review 5.

separated. The facts must be extracted by a careful analysis, and by a correspondingly careful synthetical process bound together. The facts limit the decision, for it is a fundamental principle that all judicial decisions are limited by the facts. It will be found on examination that almost all decisions are confined within a narrow circle of facts, for facts invariably set bounds to the decision, and the material facts lie within a narrow field. No real progress can be made until the analysis has separated the facts and laid them bare, so that they can be perceived in all their parts. The weight attached to each fact must be ascertained, and the influence exerted by the relations between the facts must be discovered.

In commenting on the decision, the material facts should be briefly stated, but the immaterial or irrelevant ones carefully eliminated. A vicious habit is that of reading the facts from the reports. This is inexcusable, except, perhaps, in very complicated cases. The advocate who is not prepared to state the facts of the case he presents as an authority is not well equipped for the work before him, and if he does not blunder, it will be for the reason that fortune has favored him beyond his deserts. The true course, and the only one that will surely command attention and respect, is, to so thoroughly master the facts as to be able to clearly state them without referring to the book. Reading from records and books breaks the line of argument, and much impairs its clearness and force.

Not everything said by a judge in an opinion or decision is authority in the true sense. Much is said, in almost every judicial opinion, by way of illustration and argument, and while this may be valuable as a means of proof, it is not authority. To discover what is purely authority, the point, or points, in judgment must be ascertained, and only what is decisively said upon such a point, or upon such points, should be accepted as authority. Bacon's suggestions as to the method of reporting judicial decisions are so applicable to the subject we are discussing that we quote them: "1. Write the case precisely, and the judgments exactly, at length. 2. Add the reasons alleged by the

judges for their judgment. 3. Mix not the authority of cases brought by way of example with the princpal case. 4. And for the pleadings, unless they contain anything extraordinary, omit them." [28]

No man can string together a number of particular instances and, by that process alone, construct a really strong argument. Instances may illustrate an argument, and they may, indeed, supply means of proof, but the intrinsically strong argument is that which proceeds from the principle to the particular instance. Even in inductive reasoning there is always an implied general rule or principle to which reference is either expressly or tacitly made. But in deductive reasoning the conclusiveness of the argument depends almost entirely upon the existence and statement of the general rule or principle. Sir George C. Lewis says: "The reasoning is much more perspicuous when the general principle is stated first, the particular case is placed under it, and the conclusion is then drawn. In order to argue from one case to another, it is necessary to reject from each the circumstances immaterial to the matter in hand, and to compare those in which they agree. In complex cases this process is often extremely difficult. Much sagacity and knowledge of the subject are required in order to discriminate between material and immaterial facts, to reject enough, but not more than enough. For if immaterial facts are retained the comparison becomes obscure and uncertain; if material facts are rejected it becomes fallacious. This process, which, in the argument from the precedent, must often be performed mentally, though it may be easy and sure to the experienced practician, perplexes the tyro. Hence, students of the law have great difficulty in collecting legal rules from cases, though they are soon able to apply a rule of law, laid down in general terms, to a particular case of practice."

An argument that asserts that this case, that case and the other case decide a designated point is not so strong as one that lays down a general principle, and brings the case within it. It is a much stronger form of argument to state as the major pre-

[28] Advancement of Learning, Book VIII, Chap. III, § 74.

mise the general principle, and place the particular case under that principle, than to gather together a line of particular cases. It is, of course, essential to bring the cases together and to extract the principle from them; but the explorer of the cases must keep constantly in mind the purpose of his exploration.

In gathering the cases together the advocate pursues the inductive process. But, as in all inductive reasoning, the process can be valid only where a general rule is the foundation of the reasoning. "In natural science," says an able writer, "we need an all-embracing, fundamental assumption before we can take any steps toward prediction; in other words, before we can have any science at all."[29] It is true in jurisprudence as in natural science that we need "an all-embracing, fundamental assumption," and we have that assumption in the phase of the subject we are now discussing. The assumption, roughly stated, is this: the decisions of the courts prove the law. This assumption controls and guides the investigation; without it no real good can be accomplished by proceeding from case to case. As well leap from particulars to particulars in nautral science without the assumption that there is a uniform law of nature as to move from case to case without some fundamental principle assumed to be uniform and effective in its operation. Cases are gathered, not for the purpose of simply showing what has been decided, but for the purpose of establishing a principle; and this result cannot be reached unless it is assumed that the decisions prove the law.

In the investigation the inductive process is the principal one, but in the argument to the court the deductive process is the natural and effective one. The object of the inductive process, usually, is to obtain the major premise, and when this is so, then, if a strict logical method is pursued, the advocate, by the deductive method, brings his case under the general principle asserted by the major premise. Thus, for example, suppose the case is that of a plaintiff endeavoring to enforce a contract for the suppression of a criminal prosecution, and that it is conceded that such a contract is against public policy. In such

[29] Case Law and Inductive Science, 10 Alb. Law Journal, 30.

a case the defendant's counsel will naturally endeavor to prove the invalidity of such contracts, and for that purpose will prosecute his investigation. Suppose that he ascertains that this, that and the other decision adjudge that all contracts against public policy are void, then, if he proceeds logically, that proposition will constitute his major premise, and his argument, exhibited in full form, will be: All contracts against public policy are void. All contracts for the suppression of prosecutions for crime are against public policy; therefore, all contracts for the suppression of prosecutions for crime are void. The dispute may fall on the minor premise, and when this occurs it is, of course, necessary to conduct the induction for the purpose of establishing that premise.

It is important, both for him who defends a decision and for him who attacks it, to know from what sources the means of defense or the weapons of attack may be obtained. He who defends will find near at hand a well-filled magazine. One of the sure methods of repelling an attack is supplied by the principle of *stare decisis.*[80] When successfully invoked it will yield valuable assistance, for it is a most potent principle. By invoking the aid of this great principle the advocate does not necessarily concede that the decision is unsound, for, in most instances, a decision may be defended upon its own merits as well as upon the principle of adherence to precedent. Indeed, the more merit a decision has, the stronger the reason for adhering to it. There may, however, be instances where the only defense possible is one supplied by that principle. When this happens, then the advocate will dilate upon the great good resulting from the rule of *stare decisis,* and depict and amplify the evils that will flow from a departure from it. One who makes his stand upon this principle occupies the "vantage ground," for he need be at no loss for reasons or authority.

[80] See 27 Am. & Eng. Ency. of Law (2d ed.), 158; notes in 27 Am. Dec. 631-635; 73 Am. St. 98-106 (Limitations of the Doctrine); Mabardy v. McHugh, 202 Mass. 148, 88 N. E. 894, 132 Am. St. 484, 489; London Tramway Co. v. London County Council (1898), App. Cas. 375. See also, People v. Tompkins, 186 N. Y. 413, 79 N. E. 326, 12 L. R. A. (N. S.) 1081.

The principle of the precedent is a salutary one. The advocate who takes position upon it may defend it by strong arguments. It has intrinsic merit, and is productive of good results. "It is," says Dr. Lieber, "one of the roots with which the tree of liberty fastens in the soil of life, and through which it receives the sap of fresh existence. It is the weapon by which interference is warded off. The principle of the precedent is eminently philosophical."[31] The great system which we call the common law is built on precedents. That system has received the praise of the great thinkers of the world. Sturdy John Adams so greatly valued it that he declared "that if he had ever imagined that the common law had not, by the revolution, become the law of the states under the new government, he would never have drawn his sword in the contest."[32]

Without the conservative influence of the principle of the precedent the law would be a vast collection of particular instances, almost as diverse as the habits of thought of the various judges who have occupied the benches of England and America. This principle binds the cases together and holds them in line, compelling judges of the present to consult those of the past. It gives coherence and strength to the system. It is the cement which holds together the materials out of which the great structure has been reared. Without it there would be neither a permanent standard of right nor a uniform rule of decision. The rights of person and of property would be uncertain and insecure. The wisdom treasured up through the ages in the opinions of the great judges would be practically lost, and no man would have a guide through the vast system of law and its intricate labyrinths. It is the part of wisdom "that we make a stand upon the ancient way,

[31] Civil Liberty and Self-Government, 208.

[32] Life and Letters of Joseph Story, Vol. I, p. 299. It was not the decisions of the courts that the colonies inherited, but the principles. The decisions are evidences of those principles, but they are not the principles themselves; and the American courts yield to no decisions at war with fundamental principles. Short v. Stotts, Am. L. Reg., September, 1878, 587. Bad judges have little respect for precedents. Jeffreys declared that "he had as good right to make precedents as those who had gone before him."

and then look about us and discover what is the straight and right way, and so to walk in it." If the precedents were put aside, we should lose the light that for ages has shown through the opinions of the great judges. The power of the accumulated thought and experience of men learned in the law is very great. Austin justly says: "The powers of a single individual are poor and feeble, though the powers of conspiring numbers are gigantic and admirable." Bacon was not far wrong when he gave to Justice Hutton this advice: "The first is that you draw your learning out of your books, not out of your brain; that you should mix well the freedom of your own opinion with the reverence of the opinion of your fellows." Precedents are the torches which light the way through the darkness and difficulties which are, and ever must be, found in "the laws which man hath made."

In defense of the principle of *stare decisis* the advocate who invokes its aid will naturally argue that it secures certainty. Certainty, he may, with fair show of reason, affirm, is as important as principle itself. "Certainty," says Lord Hardwicke, "is the mother of repose, therefore the law aims at certainty." Repose is essential to the well-being of society, and the well-being of society is the highest good that human laws can attain. He who destroys the means of certainty does a greater mischief than the sower of dragon's teeth. "What," demands the great French essayist, "have our legislators got by culling out a hundred thousand particular cases, and annexing to these a hundred thousand laws?" If his question can be answered by truly affirming that they got certainty, the mother of repose, the objection suggested by it is completely refuted. "Discretion," said Sir Edward Coke, "is a crooked cord." A profounder thinker, if not so great a lawyer, said: "Certainty is so essential to a law that a law without it cannot be just; for if the trumpet gives an uncertain sound who shall prepare himself to the battle?"[83] Again, he says: "For as that law is ever the best which leaves least to the breast of the judge, so is that judge the best who leaves least to himself."[84] Other lawyers have pushed the principle much

[83] Advancement of Learning, Book VII, Chap. III, § 8.
[84] Ibid, § 46.

further. One says: "Where things are settled and rendered certain, it will not be so material how, so long as they are so, and that all people know how to act."[35] Another says: "No matter what the law is so it be certain."[36] The verge is reached, if not passed, in this last expression.

Where a decision establishes a rule of property, the courts will depart from it with extreme reluctance; they will, indeed, tenaciously adhere to it, unless driven from it by the highest and strongest considerations of justice. Decisions upon questions that do not affect property rights are much less rigidly adhered to than those upon questions that do, and it is for this reason often quite important for the advocate who relies upon a decision to prove that it establishes a rule of property, while, on the other hand, it is quite as important for the opposing counsel to prove, if he can, that the decision does not establish such a rule.

The advocate who attacks a decision has a much more difficult task than he who defends it. But the task is not always hopeless. Judicial decisions are not so sacred that they may not be assailed.[37] Courts have erred again and again, and, as judges are but men, there will, one runs not much risk in predicting, be errors in judicial judgments until the end of time. Precedents are the means of development, not obstacles to progress. They exercise a conservative influence in the expansion and development of jurisprudence, but they do not stay the process of development. If they were deemed beyond assault, then the present would be chained to the past, and we should forever walk in the "dim footsteps of antiquity." It is the part of wisdom to respect precedents, but it would be unwise to place them above criticism. Precedents are not fetters binding the present to the past in links of steel; they are, at most, but cords connecting and marking the line of judicial thought. If the line be crooked, it may be changed, and

[35] Ashhurst, J., in Goodtitle v. Otway, 7 Durn. & E. 419.

[36] Chancellor Parker, in Butler v. Duncomb, 1 P. W. 452.

[37] "The judges of our appellate courts must get legal knowledge from the same sources as inferior judges; but their duty sometimes is to examine precedents *de novo*, and in doing so they may find that a long course of precedents has originated in mistake." Broom's Philosophy of Law, 6.

the true direction taken, since no one is bound to continue in the wrong path. The great principles of right and justice are unchangeable, but precedents do not always express those principles. Precedents are not the principles themselves; at the most, they are only the images of those principles. They are not the principles of right; they are men's conceptions of the principles of right. If the light of experience reveals the untruthfulness of the image, it may be broken, for such an image is only valuable when it justly represents the principle which it professes to exhibit. If the power of reason demonstrates the inaccuracy of the conception, it may be put aside and its place be given to a true one.[38]

The great number of overruled cases found in the reports of all the courts proves that precedents may be successfully attacked and overthrown. He who attacks is, however, at great disadvantage, for the precedent is entrenched by presumptions of many kinds, and fortified by the rule that what has been decided must stand, unless its errors and infirmities so plainly appear that it can be adjudged, without doubt or hesitation, to be radically wrong. Even then it will not always be overthrown.

It is not every judicial decision that can justly be regarded as a precedent. It is, therefore, the part of wisdom for one against whom it is adduced, first of all, to determine whether it is, in any just sense, entitled to be considered as authority. We do not now mean that he shall inquire whether it is relevant (that subject is to be hereafter discussed), but we mean that he shall inquire whether it was ever entitled to the rank of a precedent. It may be that the particular decision is so clearly opposed to contemporaneous decisions in the same court as never to have acquired the dignity of authority. It may be that elsewhere it is so opposed that it cannot be justly assigned that rank. We suppose that no case

[38] See "Precedents versus Justice," 27 Am. Law Rev., 321. "It is more important," says Mr. Justice Field in Barden v. Northern Pac. R. Co., 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. 1030, 1036, "that the court should be right upon later and more elaborate consideration of the cases than consistent with previous decisions. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."

can be justly considered a precedent that is entirely out of line with principle and with the contemporaneous decisions of the same court. So, too, a decision may not be entitled to rank as a precedent because some provision of the statute or the constitution has been overlooked. Decisions are authoritative only upon the points actually before the court for judgment, and actually decided; so that it sometimes happens that a point that might have been made, but was not made, is not determined. It has happened that statutory provisions have been overlooked by court and counsel that, if they had been considered, would have changed the result.

The force of a judicial decision may be weakened by showing that it was influenced by the exigencies and demands of the time. Courts have wrongfully yielded to the pressure about them in times of war and great public commotion. This is true of some of the courts of England during the civil wars of that kingdom, and is true of the courts of some of the states during the war of the rebellion. Time often works such changes as to completely overthrow judicial decisions. What would now be thought of an advocate who should adduce as a precedent a decision in one of the old witch cases?

The law is a practical science, as he who attacks a decision may justly affirm, and its principal object is to promote the well-being of society. Decisions which impair its efficiency as an instrument for promoting the public welfare defeat its great purpose, and what does this should not stand; therefore, decisions which do this should not stand. This principle has overturned many decisions, and will overturn many more. Experience is the great teacher in jurisprudence as well as elsewhere, and where experience teaches that more harm will result from adherence to a decision than good, the duty of the court is to overrule it. Doctrines are tested by experience, and a decision which asserts a doctrine demonstrated by experience to be hurtful to society deserves condemnation. It can be neither defended upon true principle, or justified upon grounds of public policy. Public policy is a more potent factor than courts avow or men perceive. In theory, expediency has no effect on judicial decisions, but in fact, it has.

It is a silent influence, but, though it works in silence, it works incessantly and with power. Judge Holmes says, with much truth, though the expression is, perhaps, rather stronger than the facts justify, that, "The very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."[89]

The expediency which courts regard is not, however, that which a particular instance seems to call forth, but that which affects the great body of the people. Expediency is not a happily chosen word. It narrows the subject too much. Better name the influence public policy, or governmental policy, and discard the term expediency, for that is apt to create a false impression. Governmental policy does influence courts; not so expediency, unless we understand that word in a sense different from that in which it is ordinarily used. Expediency dominates legislative action, but not judicial action. Governmental policy may, upon the soundest and highest principle of jurisprudence, influence judicial decisions. At the foundation lies the maxim: "That regard be had to the public welfare is the highest law." A decision which is hurtful to the public interests may be attacked upon the ground that it violates this maxim, and in doing so turns from the straight road into a crooked one. Public welfare demands that justice be awarded to every one whose rights have been invaded, and a decision which stands in the way of awarding justice must fall before the higher and stronger rule that the welfare of the public be preserved and promoted.

High authority is at hand in support not only of the wisdom, but the expediency, of refusing to follow wrongly decided cases. Chancellor Kent says: "Even a series of decisions are not always conclusive evidence of what is law, and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it." He also says: "It is probable that the records of many of the

[89] Common Law, 35.

courts in this country are replete with hasty and crude decisions, and such cases ought to be examined without fear, and reversed without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed, by the perpetuity of error."[40] This is the doctrine generally followed by the English and American courts.[41]

The counsel who attacks a judicial decision will find in the long line of overruled cases many decisions that border on the absurd so nearly that no one can certainly affirm that there is an inch of borderland. He will, indeed, find some that are not yet overruled amenable to similar criticism. But for the higher principle, the rule of *stare decisis* would have compelled an adherence to the absurd decisions that have been overruled. The quaint conceits which influenced many of the earlier judges, and the influence of the wild and unreal speculations of the schoolmen, led to many decisions as destitute of reason as they were hurtful to the public welfare. A case made famous by its supposed connection with the grave-digger's scene in Hamlet supplies many examples of quaint conceits.[42] One of the reasons given for the decision by Lord Dyer, by whom the opinion of the court was delivered, was that the offense was against the king. "Against the king," said his lordship, "in that thereby he has lost a subject, and (as Brown termed it) he being the head has lost one of his mystical mem-

[40] Kent's Com., 477.

[41] Bright v. Hutton, 12 Law and Eq. 1-15; Hart v. Burnett, 15 Cal. 530-607; Paul v. Davis, 100 Ind. 422-427; Ram's Legal Judgments, 201. See also, Rich v. Chicago, 59 Ill. 286; Remey v. Iowa Cent. R. Co., 116 Iowa 133, 89 N. W. 218; Rumsey v. New York &c. R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. 600; Truxton v. Fait &c. Co., 1 Pen. (Del.) 483, 73 Am. St. 81, and note; 27 Am. & Eng. Ency. of Law (2d ed.), 183.

[42] Hales v. Petit, 1 Plowden 253. If Shakespeare ever borrowed of any one, which may, as Gibbon says, be doubted, we may well believe he borrowed from the argument of the learned Sergeants Southcote and Puttrell, for the grave-digger's legal argument is, in substance, the same as theirs. Their argument seems to have been regarded as forcible, for it required four learned sergeants to answer it, and required, also, quite a discussion from the court. As Dr. Johnson truthfully says, "No precedents can justify absurdity."

bers."[43] Fewer absurd theories, however, will be found in the records of English jurisprudence than those of any other science. The judges have been, in by far the greater number of cases, hard-headed, practical men, and although influenced by the schoolmen to a harmful degree, yet they seldom surrendered entirely their rugged sense and sound love of justice. But there are, nevertheless, so many decisions in the long line of overthrown cases so clearly wrong, that an attack upon an existing decision is not, at least, open to the reproach of foolhardiness, though most often the attacking counsel leads a forlorn hope to an unsuccessful attack.[44]

The argument will fall far short of its purpose unless it applies the principle ascertained and stated to the particular case at the bar of the court. The discovery and statement of a legal principle is not enough; the application must be made. The ruling premise must not only be perspicuously stated, but the logical connection between it and the particular case must be brought fully into view by marking out the line which leads from the general to the special. The principle should be folded about the case by means of argument, examples and illustrations. General principles, as we have seen, do not always govern special cases; for cases may possess inherent points of difference mingled with points of resemblance, but the former so strongly predominating in the particular case as to carry it out of the general principle and place it within some special rule built up as an exception to the general principle. Many illustrations of errors in the appli-

[43] The modern rule on the subject of contributory negligence rests, in some measure, upon a similar reason, and that reason is, the community has an interest in the life of each of its members, which no one of them has a right to negligently put in peril.

[44] Lincoln once answered the argument from precedent in this way: "Old Squire Bagley from Menard came into my office once and said: 'Lincoln, I want your advice as a lawyer. Has a man that's been elected a justice of the peace a right to issue a marriage license?' I told him no, and he threw himself back indignantly in his chair and said: 'Lincoln, I thought you was a lawyer. Bob Thomas and I had a bet on this thing, and we agreed to leave it to you, but if this is your opinion I don't want it, for I know a thunderin' sight better. I've been a squire now eight years and I have done it all the time.'"

cation of principles to cases are found in the reports, and prove that men starting from a right premise have reached a wrong conclusion because of a failure to clearly discriminate and mark the difference between the special case and those governed by the general rule.[45]

A just application of a general principle cannot be made unless the entire case is known in all its parts. The marks of a thing must be discovered before it can be known what it is and where it belongs.[46] A man cannot identify the case as of the class governed by the general principle by a mere acquaintance with its outlines; he must know its peculiar features, as one man must know the peculiar features of another in order to identify him among his fellows. Fallacies often creep into arguments because of a failure to discriminate essential points. Thus, the general rule is that one crime may not be established by evidence of another.[47] But one who should invariably apply this general rule to resembling cases would go astray, for there are many cases, having many elements in common, to which the general rule does not apply, as, for instance, where the offense is continuous in its nature, or where one crime is connected with another, or where knowledge and intent form essential ingredients of the controversy.[48] In some instances the mistake is a broad one, for it consists in a failure to discriminate between essentially different classes of cases. Thus, in one case, the court said: "The fallacy of this argument, when applied to common carriers, consists in not discriminating between the obligation which he is under to his passengers and the duty which he owes to a stranger."[49]

Maxims are legal proverbs.[50] But maxims, like proverbs, will

[45] Moss' Appeal, 83 Pa. St. 264, 24 Am. 164; Waugh v. Waugh, 84 Pa. St. 350, 24 Am. 191; Walsh v. Chicago &c. Co., 42 Wis. 23.

[46] Port Royal Logic, 44; Bowen's Logic, 175; McCosh's Logic, 22.

[47] State v. La Page, 57 N. H. 245, 24 Am. 69.

[48] Eastman v. Premo, 49 Vt. 355, 24 Am. 142.

[49] Goddard v. Grand Trunk R. R., 27 Me. 202, 2 Am. 31–40.

[50] "Maxims," says Sir James Macintosh, "are the condensed good sense of nations." "They are," says Coke, "to be of all men confessed and granted, without proof, argument, or discourse."

not fit all cases.[51] It is, in truth, not easy to condense a practical rule into a maxim. Abstract, general legal truths maxims do undoubtedly express, but practical truths applicable to concrete cases they do not always contain. A lawyer who relies too much on maxims, while a great deal better off than one who knows nothing of them, is not, as a general rule, a very successful trial lawyer. This is so because he loses sight of the essential elements of the particular case in trying to make every case fit a maxim. His error is very much the same as that of the schoolmen who labored, with more success than was good for the world, to make all things, abstract and concrete, material and immaterial, conform to the abstract rules of Aristotle. Valuable as are our maxims, one needs to be cautious in giving them too wide a sweep. The man who is full of proverbs and old sayings is seldom the practical man of business.[52] Not every maxim can be applied in its wide sweep. One who assumes that maxims can be so applied will find himself checked and halted at many points.[53]

The principle embodied in a maxim is generally sound, but the fallacy in employing it arises out of the attempt to make universal a rule that is only general. The underlying fallacy of the process by which a disputant endeavors to apply a maxim to every resembling case is that of undue assumption, for in every such

[51] "Proverbs again are frequently employed in arguing by indistinct resemblances. It is the slackness with which any striking analogy will commonly pass muster that leads to the use so freely made of proverbs." Sidgwick on Fallacies, 266. It is not every advocate that employs maxims evenly as wisely as Sancho Panza did proverbs.

[52] "Polonious is a man of maxims. While he is descanting on matters of past experience, as in that excellent speech to Laertes before he sets out on his travels, he is admirable, but when he comes to advise a project he is a mere dotard. * * * A man of maxims is like a cyclops with one eye only, and that in the back of his head." Coleridge's Table Talk.

[53] Black v. Ward, 27 Mich. 191, 15 Am. 162n, 171; Louisville &c. R. Co. v. Nitsche, 126 Ind. 229, 237, 26 N. E. 51; Doctor and Student Dial, I, Chap. VIII, IX; 15 Irish L. T. 181; 4 Am. L. Review 201; Thurston v. City, 51 Mo. 510, 11 Am. 463; Bonorm v. Backhouse, 27 L. J. (N. S.) 388. "We believe," says Mr. Townshend, "that not a single law maxim can be pointed out which is not obnoxious to objection." Ram on Legal Judgments, 45.

process it is tacitly assumed that the maxim is universal, when, in fact, it is no more than the embodiment of a general rule, subject, for the most part, to many exceptions. But one who should reject maxims would be a worse reasoner than he who attributes universality to them, for maxims, as expressions of general rules, do apply to the greater number of cases. More than this, they are the condensed expressions of learned and experienced men, and mark the general current of opinion of those whose utterances are entitled to rank as authority.

Important as maxims are—and their importance as a means of acquiring and retaining legal knowledge can scarcely be overestimated—they do not furnish an unyielding rule for every case.[54] To justice they must yield, and where the particular case plainly shows that injustice would be done by applying them, then they will be denied application, if it can be done without disturbing the harmony of the law. It is not possible to give rules which will enable one to determine when a maxim shall or shall not be assigned the ruling place. Rules cannot supply the place of thought and study; nor can they so well equip a man that he can do the right thing at the right time. They may suggest considerations that will aid him, but they cannot do much more. There is no touch-stone by which the applicability of maxims to a particular case may be tried. The surest means that a man can take to reach a sound conclusion in such a matter is to consider and determine what will secure equity and justice.[55] Even here there is no certainty, for men differ upon these points, positive laws hedge the subject about, and precedents limit and restrain individual judgment. An able judge, whose diction is as admirable as his thought, says: "Legal logic should be constructed upon principles at least akin to justice, the attainment of which should be its end and object; and by its tendency to this end its soundness should be tested. As the surveyor tests the correctness of the line in his front by taking a back sight along the line he has run, the real

[54] Warren's Law Studies (3d ed.), 265; Broom's Legal Maxims, Preface. See also, Help's "Friends in Council," Chap. II, p. 38.

[55] "Justice is the constant and perpetual will to give to every one his right."

logician may often profit by pausing to test his logic by its results. Accidental evils, it is true, will sometimes result from the soundest rules devised by human wisdom when applied to the facts of particular cases. But when the natural and ordinary tendency of the rule is generally and systematically to produce injustice without any compensating benefit, the logic by which it is supported may safely be suspected of a lurking fallacy somewhere."[56]

A general rule cannot be denied application because it may happen that it will operate harshly in a particular case. Laws must, of necessity, be uniform, and apply to all alike. Cases cannot be arbitrarily excepted from general principles, for unless there is something in the case itself which constitutes it an exception to the general rule, that rule must be applied. In the very necessity of things rules must be general, although in some cases hardship will result from their enforcement. If this be not accepted as the fundamental principle of jurisprudence, then the result will be that courts will arbitrarily decide cases without respect to existing rules, and all matters of judicial concern will be enveloped in confusion and uncertainty. This would produce a general evil, while the utmost that can be said against the uniformity of law is, that it may sometimes cause individual hardship. But isolated cases of hardship are much less deplorable than general evil. The one may be caused by the uniform application of general rules, while the other will surely result from an attempt to lay down a special rule for every particular case. Laws must be, and are, adapted to the cases which most frequently occur, for no finite mind can devise laws for every case.[57] Hard cases make bad law, because they destroy the uniformity of laws, and sacrifice the general welfare to particular cases of infrequent occurrence. It is evident that one who puts his case upon a general principle has the stronger position, for he will not only have less difficulty in proving the principle, but he will also have an easier task to prove his case within it than one who takes position on an exception to the principle.

[56] Christiancy, J., in Huron v. Dale, 19 Mich. 17, 2 Am. 66.
[57] Broom's Maxims, 43.

While uniformity cannot be broken for the sake of an individual case, yet the extension of a rule may be combatted on strong grounds. Indeed, as we have seen, the rule itself may be successfully assailed. But one who assails the rule, or denies its application, will find himself in an indefensible position if he puts his attack solely on the ground that the application of the rule to the particular case will work a hardship. If, however, he can prove that the rule itself, "generally and systematically," produces injustice, he may hopefully attack, for if the rule be not one declared by positive law, or is not too firmly settled to be shaken, his assault will generally be effective. Or if he can prove that the application of the rule will destroy the symmetry and harmony of the law and create an anomalous case without sound reason underlying it, he will do a good work, and one not likely to be barren of results. While particular cases cannot break general rules, yet if they are without the reason of the rule, or if justice demands the denial of the rule, there need be little fear that a strong contest will be fruitless. If the application of the general rule will disturb the harmony of the law and deform its symmetrical proportions, one may be quite sure that courts will deny its application.[58]

Rules that operate unevenly and harshly are seldom applied without reluctance, even when courts feel bound to yield to them; but when not bound they are quick to make a just and equitable application of special rules, built up as exceptions to the general principle. Courts apply with caution rules that deny equity, even in particular instances, although, bound as they are by positive law and established principles, they are in some instances compelled to refuse to bend the rule to the case. But when the rule is seen to apply with harshness, it will be limited rather than extended. In one case it was said: "The very working of the principle, this one-sided and uneven justice, suggests great caution in its application;"[59] and this feeling, though not often

[58] Blackst. Com., 69; Preface to 10 Coke's Rep.; Bliss on Sovereignty, 43.
[59] Clemmens v. Clemmens, 28 Wis. 637, 9 Am. 520-532.

directly expressed, is very frequently a potent influence in the judicial mind.[60]

In applying cases, as well as principles, to facts, it must always be kept in mind that there are few general principles, or general rules, in all the range of jurisprudence that are without exceptions. Exceptions, be it always remembered, are as important as the general rule itself. Exceptions do not prove the general rule in the sense in which that term is now ordinarily employed, but they do test it. "Prove" means in some cases to test; indeed, that was once its most usual signification, but in these days the word is not ordinarily employed by the lawyers in that sense. A general rule that will not bear the test of exceptions is, although it seems paradoxical to so assert, no general rule. We do not, therefore, look to exceptions to prove a rule, that is, to establish it; what we do look to exceptions for is to ascertain whether the rule will bear the test. A rule where the exceptions are broader, or the cases governed by them more numerous, than those which the rule governs, is not a general rule. A rule which breaks beneath the weight of many and important exceptions is not a general rule in any just sense, even though it applies to the greater number of cases, unless, indeed, the weight of conspiring numbers is very great. It is, for this reason, prudent to examine, with scrupulous care, rules stated as general ones before accepting them as such, no matter where or by whom stated, for courts, intent on the facts before them, do not always set accurate bounds to their statements, and text writers, dealing in abstract principles rather than in concrete matters, lose sight of the particulars in their search for the abstract rule. Men are often deceived by the assumption that a rule is a general one, but are, perhaps, more often deceived by accepting as a universal rule one so severely strained by exceptions as to be scarcely entitled to the dignity of a general rule.[61] "It is," says Mr. Sidgwick, "by seeing exceptions, and thus

[60] "Let reason be prolific, but custom sterile, that it may breed no cases. Therefore, what is received against the reason of the law, or even where its reason is obscure, is not to be drawn into consequence." De Augumentis, Book VIII, Chap. III.

[61] Fallacies (Sidgwick), 36.

guarding our statements, that we establish any law on a firm basis, making it henceforward unexceptionable. By searching for exceptions we test, or try, the law set up for proof."[62] It is evident from what we have said that in jurisprudence the test cannot be so rigidly applied, for rules may be regarded as general although there are exceptions. But the more numerous the exceptions the more the rule is weakened.

One who assails a rule asserted against him as a general rule, will be wise to multiply exceptions, since the number of exceptions not only weakens the rule, but also supplies ground for affirming that the particular case is not governed by it. The greater the number of exceptions, the stronger reason for asserting that the rule does not apply to the particular case. A rule with few exceptions necessarily embraces many cases, for the wider the rule the more cases it takes up in its sweep; whereas, a rule with a great number of exceptions extends only to a few cases, for the narrower its sweep the fewer the cases it governs.

If investigation results in establishing the rule to be a general one, the party who invokes its aid will naturally adduce argument and illustration to prove that the particular case is within the rule. Where the rule is conceded to be a general one, and position is taken on the proposition that there are exceptions to the rule, the burden is, in general, on the party who affirms this proposition to show the exception, and that the case is within it. Thus, in a case against a master, wherein the servant seeks a recovery for injuries received from defective machinery, the general rule is, that the master is not liable if the danger was known to the servant; but to this rule is the important exception that, if the master promises to remedy the defect, the servant may recover.[63] In such a case, the plaintiff must show the exception, and this he cannot do without showing the basis for the exception. If no reason be shown for the exception, it cannot exist, and the general rule must prevail. Nor is it enough to establish a reason for the exception, for it must also be proved

[62] Fallacies, 249.

[63] Indianapolis &c. Co. v. Watson, 114 Ind. 20, 14 N. E. 721; Counsell v. Hall, 145 Mass. 468, 5 New Eng. 463.

that the reason which constitutes the basis of the exception applies to the case put upon the exception as the ruling principle.

It is often necessary to keenly discriminate between the rule and the exception, and in the practical application of the law to the facts even closer work is required, since it is the facts which supply the groundwork for the entire process, and a difference in the facts of a case makes a difference in the application of the rule much greater than the difference in the facts would, at first blush, seem to demand, but which, on close study, will be found to be imperiously demanded by plain principles of justice.[64]

It is not to be supposed that, because no precedent can be found, there is neither a right nor a remedy. If there is a right, there is always a remedy. The search, then, is first for the legal right, and if no precedent can be found, the right must be placed upon the principle of natural justice. The object of all law is justice. "Justice," says Fortescue, "is the virtue, jurisprudence the science; justice the end, jurisprudence the means." "One rule can never vary," said Lee, C. J., "viz., the eternal rule of natural justice. This is a case that ought to be looked on in that light."[65] "The common law," said a great lawyer, "which works itself pure by rules drawn from the fountains of justice, is superior to an act of parliament."[66] Where the justice of a suitor's cause is made to appear, courts will not deny him relief because no precedent can be found, although the failure to find a precedent, that is, a case directly in point, or one declaring an analogous principle, creates a presumption against the right to maintain the action. But while the absence of a precedent creates an adverse presumption, it does no more. "Private justice, moral fitness and public convenience, when applied to a new subject, make common law without a precedent."[67] The common law is older than precedent. "It had," said Aston, J., "an ancienter original than Edward the

[64] "If you do not learn to discriminate," said Mr. Abbott to a student, "you will never be a lawyer." 20 Cent. L. J., 220.

[65] Omychund v. Barker, 1 Ark. 46.

[66] Lord Mansfield, as quoted in Austin's Juris., 686.

[67] Willes, J., in Millar v. Taylor, 4 Burr. 2312.

Confessor, and was first called the *folc-right,* or the people's right."[68]

In extending precedents to new cases, the sure basis is the rule of Sir Edward Coke that, "Like reason doth make like law."[69] Cases of a general class may possess points of resemblance and yet be materially different in principle. It is, indeed, true that cases of a general class do always have some features that are alike, and even cases of different classes are not without points of resemblance. It is a work of difficulty to trace the differences and to ascertain the points of resemblance so that the thinker can himself clearly perceive them; and it is a work of much more difficulty to communicate the thinker's conception of these resemblances and differences to other minds. We often see a bank of clouds in the sky, and after study are able to discriminate between resembling ones, but find it almost impossible to clearly convey our conceptions to others. It is often so of precedents—the thinker himself sees the resemblance or the difference, but cannot adequately communcate what he perceives to those whom he seeks to persuade or convince.

There is but one sure road to success, and that is to concentrate the mind so strongly and determinedly upon the subject that the points of difference or of resemblance will be magnified, and appear even greater than they actually are. An impression thus stamped upon the thinker's own mind can be forcibly conveyed to others; whereas, a faint and dim impression will fade out in the act of transmission. Care is requisite, however, to prevent the mind from magnifying false conceptions instead of true ones. If the conception is false, the more it is magnified the easier it will be for the hostile watcher to expose the unsoundness of the argument built upon it. The concentrated thought must, like the rays of light, be directed upon the principle which gives vigor to the

[68] Ibid, 2343.

[69] Coke, Litt., 10a. "Let us consider the reason of the case," said Powell, J., in Coggs v. Bernard, 2 Ld. Raym. 911, "for nothing is law that is not reason." Sir James Macintosh says: "It has been the constant labor of judges through all changes of society to keep the common law consistent with reason and with itself." Ram's Legal Judg., 26.

precedent, for the "like reason" is the object of the search. If that be not discovered the quest will be fruitless.

The bridge which carries the lawyer from one case to another is that of "like reason." A long distance may be safely traversed upon the bridge of "like reason," but he who attempts to go from one case to another without proceeding on the rule that "Like reason doth make like law" will find himself upon a bridge of many broken arches, such as Mirza saw in his vision, as he slept upon the side of the long and narrow valley of Bagdad. In physical science there is a process known as the leap, or jump,[70] and by this process investigators leap from a known truth to those that are unknown. Possibly, there may be cases where a lawyer must leap from a known case to a new one, but there is peril in this process, as is evident by the multitude of exploded theories that lie thick along the path of scientific progress. In discussions of questions of fact, often and often this leap must be made; not so in discussions of matters of law, for there we may proceed with safety upon the rule of like reason. It would be a wild attempt to undertake to leap from case to case without the aid of that principle. Almost as well attempt to cross the rapids of Niagara by leaping from rock to rock as to undertake to go from case to case without the support of this great rule. One must, at the outset, make sure that he is on the true road, the road of "like reason," since, if he goes wrong at the start, the further he goes the further he will get from the true course, and, like him of whom Bunyan tells us, at the end he will be lost in the wilderness. In more places than one in advocacy, "Good onset bodes good end."

The law does not expand by the formation of new principles (except where the people, in their sovereign capacity, or the legislature, in their representative capacity, declare new principles), but by the extension of existing principles to new cases. "But a principle newly applied," says Judge Cooley, "is not supposed to be a new principle; on the contrary, it is assumed that from time immemorial it has constituted a part of the common law, and that it has not been applied before because no case has

[70] Bain's Logic, 233.

arisen for its application. This assumption is the very groundwork and justification for its being applied at all, because the creation of new rules of law, by whatsoever authority, can be nothing else than legislation, and the principle now announced for the first time must always be so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it, as the decision assumes it to be."[71]

The application of the principle must be so made to the new instance as not to impair the harmony of the system. In theory, at least, all rules and all statutes are parts of one great and uniform system of law, and, if a principle is not justly applied, the uniformity and harmony of the system are marred and disturbed, because the new decision, taking rank as a precedent, does not assume its appropriate place. A case cannot be allowed to be well decided if the decision cannot take its place as the expression of a rule among the other adjudged cases without producing discord and confusion. If the rule extracted from it can find no place in the system without jar or agitation, then the conclusion must be that the decision is wrong. The rule deducible from a right decision will take its place with the existing rules of the system in harmony with them all. This will often supply a test for determining whether a case has been correctly decided, as well as for determining how a case shall be determined.

The consequences to which a rule will lead exert an important influence upon its practical application.[72] Indeed, when the evil consequences of a rule are clearly perceived it will often be overthrown. This, however, will not be done, except where it is clearly perceived that an evil result will follow from an adherence to the decision. We have, in another place, referred to the fact that courts give heed to consequences, and strong reasons may easily be adduced why they should do so. It is, after all, not so much the mere abstract, logical consistency of a body of rules that

[71] Cooley's Torts, 12, 13.

[72] Coke's Litt., 976. Lauton v. Lauton, 3 Ark. 16; King v. St. Catherine's Hall, 4 Durn. & E. 313; Sulgrove v. Kirby, 6 Durn. & E. 488; United States v. Kirby, 7 Wall. (U. S.) 482, 19 L. Ed. 278; Rodman v. Reynolds, 114 Ind. 148, 16 N. E. 516. See also, Swoope v. Swoope (Ala.), 55 So. 418.

gives it value as it is its power to promote the public good and justly vindicate the rights of the citizen. Courts are more willing to deny the applicability of a bad rule to new cases than to overthrow the rule. It is, for this reason, generally more prudent to make a stand against the extension of the rule than to attack the rule itself.[73]

In most instances, reasons exist for discriminating a new case from an old one, as well as for contesting the applicability of the old rule to the new case; and these reasons, even though not of the strongest, will, when supplemented by a vigorous attack upon the rule itself, defeat its application to the new case. Where the attack upon the rule is made for the purpose of reinforcing the attack upon its application, grounds should not be taken in favor of overthrowing the rule, but in favor of a denial of its application to the particular case. The main contest should be on the question of the justice of applying the rule, and not on the soundness of the rule itself. But where the reason for the rule no longer exists, there its application, even to cases of a like nature, except for the changed circumstances, may be denied on that ground. *Cessante ratione, cessat ipsa lex,* is a maxim that furnishes the groundwork of such an argument.[74]

Where resistance is made to the application of an existing rule to a new case, the difference between the cases to which the rule has been applied should first be shown. It is better to prepare for the criticism upon the rule by advancing gradually rather than to assail at once, and preparation may be made by discriminating and stating the differences between the new case and the old one. After this is done by plainly marking out and exhibiting the differences, then the injustice of applying the old rule to the new case should be stated and enlarged upon with earnestness. It is

[73] "Lord Mansfield held 'the law to be best applied when made subservient to the honesty of the case.'" Broom's Philosophy of the Law, Chap. III. Courts are always influenced by considerations of equity and justice. United States v. Kirby, 7 Wall. (U. S.) 482, 19 L. Ed. 278.

[74] See Cooke v. Doron, 215 Pa. 393, 64 Atl. 595, 7 L. R. A. (N. S.) 659, 662; Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285, 5 L. R. A. (N. S.) 611; Beardsley v. Hartford, 50 Conn. 542; Green v. Titer, 8 Cranch. (U. S.) 229, 249, 3 L. Ed. 104.

in showing the injustice of applying the old rule, more, perhaps, than in any other part of the argument to the court, that skill and talent are called into exercise. The invention of reasons, the framing of examples, and the gathering up and contrasting of the effects that would result, will tax the ingenuity and ability of the ablest advocate.

After the differences have been exhibited, and the injustice of applying the old rule to the new case has been well presented, then an attack upon the rule itself will reinforce the other arguments. Where this course is pursued, it is safest, as a general rule, to attack obliquely—by suggestions rather than by direct criticism. It is not prudent to denounce the rule strongly, since that will make the assault seem to be directed against the rule itself rather than its application.

The advocate who asserts that a known rule should be applied to a new case will naturally do all he can justly do to prove that there is no essential difference between the new case and those to which it is conceded the rule does apply. His search will be for resemblances, and these he will amplify; the differences he will show, if he can justly do so, are accidental and not essential. The resemblances will be brought into the foreground, and the differences placed in the background. Seldom, indeed, are two cases precisely alike, and yet the ruling principle may be the same.

Cases stand on principle, and if the principle which can with justice be applied to the new case is an old and tried one, the stronger the reason for applying it in all its vigor. If the ground is strange and untrodden, the more reason for adhering to a rule that has proven just and salutary in its practical operation. One who discards the ancient rules is very apt to drift into unknown depths, without chart or compass to guide him. A good rule is a safe guide. A line of cases is an excellent cord to lay hold of and cling to in so great a science as the law. A rule that has in the past secured justice will do so in the future. It will, therefore, be prudent for one, in a case where the contest is strong and the result doubtful, to praise the rule, dwell upon the good results a strict adherence to it has produced, and depict the evil conse-

quences that will flow from a departure from it. Not every case requires this course, but many do.

In general, it is enough to establish the rule, and make the fight upon the consequences likely to result if it is disregarded and another rule applied, but it is, sometimes, necessary to do much more. In many instances, it is well to urge the danger of multiplying exceptions, and to contend that the consequences of breaking general rules by many exceptions will be more disastrous than a strict adherence to one rule, even though, by adhering to it, an individual may suffer a hardship. In many cases it is expedient to contend for the extension of the rule, for the reason that no better can be devised. One may, it is obvious, with force and reason, affirm that a good rule should not be contracted, but, on the contrary, should be expanded. So, too, it may well be asserted that it is better to apply what is known than to give a trial to what is unknown. There is, indeed, much more reason for expanding what the past has tested than there is for applying an untried rule. The application of a general rule prevents confusion, for confusion is created by contracting old rules by building up exceptions. No rule can be made for every case; so that it is, in the main, wise to bring the case within the rule, even though in some points it differs from the old cases. A system overbuilt with exceptions cannot be a good one. The refusal to expand old and tried rules not only works evil by multiplying exceptions, but it also disturbs that repose so essential to the good of society, and creates uncertainty and confusion.

CHAPTER XII.

FALLACIES AND ARTIFICES.

"Of course, by definition, Fallacy and Sophism are distinct—the latter is clever deception, the former only honest error; but the line between them in real life is so dim and wavering that the distinction is practically useless for most purposes, except that of giving our neighbor an uncomplimentary name."—*Alfred Sidgwick.*

"A fallacy is any instance of unsound or invalid reasoning which has a deceptive appearance of correctness and truth."—*Professor Bowen.*

"But these small wares and petty points of cunning are infinite."—*Bacon.*

"A fallacy," says Jeremy Bentham, "is a false argument presented in a more or less deceitful form. There is always a degree of artifice in it, though it does not necessarily imply insincerity. When employed it may deceive the user of it himself, as a person may give out bad money which he believes to be good."[1] In the discussions of the forum there is sometimes insincerity as well as error, but error more often than insincerity. We have elsewhere shown how the advocate, heart and soul, becomes enlisted in his client's cause, and this earnest devotion to the man who puts his trust in him so warps his mind that he accepts as true only that which is favorable to his client, and rejects that which makes against him as false or erroneous. This partisanship, while an element of strength, is, paradoxical as it may seem, nevertheless, a source of weakness, for it destroys, in some measure, at least, the power to justly weigh evidence and arguments. Counsel are frequently so strongly carried along by their zeal that they accept as an argument that which is so in appearance, but not in reality. Friendly eyes are apt to overlook faults, and friendly zeal, reinforced by professional pride,

[1] 3 U. S. L. Mag., 148.

is almost sure to cause the advocate who is not conscious of danger from this source to injure the cause he is so anxious to benefit, by accepting as arguments fallacies and sophisms. "He gives out bad money for good," as Jeremy Bentham puts it; and where, as in the case of a hired advocate, even slight circumstances may excite suspicion, the giving out of the bad for the good is very apt to create the belief that, either there is no good money, or else the man who gives out the bad is not over-honest.

A cause is weakened when arguments are employed that can not be sustained, and, for this reason, it is always better to select a few strong ones than to employ many that are partly fallacious. An advocate is much more likely to be himself deceived than to deceive others who are watching him with hostile eyes eager to find some vulnerable point in his position. It is, therefore, essential that he should himself weigh with scrupulous care the arguments he proposes to employ, and eliminate with a stern hand all that are unsound. If this be not done, a hazard is incurred which may result in disaster, for the adversary may select the weak arguments, and, by overthrowing them without noticing the really strong ones, secure the victory. Many causes, moral, political and legal, have been seriously injured by feeble arguments, and he who undertakes to construct a great number almost invariably frames some that will not bear examination. A few central positions, firmly taken and well fortified, are better than a great number. Numerical force is weak, but intrinsic force is strong.

Strong arguments can not be made too boldly, nor is there need to hide them in words. They need no cover. The clearer and bolder their outline the better. A strong argument well stated is more often weakened by elaboration than strengthened. A process of explanation and refinement is quite as likely to fritter away its force as to augment it. When an argument is made to appear, as most often it is by a prolix discussion, to be held up by props, its strength is materially impaired. The effort should be, not so much to prop up an argument by incidental

supports, as to make it seem strong in itself. Only weak structures require props, and where props are seen weakness is suspected. It was well said of Webster that his statement was an argument,[2] and the advocate who acquires the power—and it is a power—of stating his arguments clearly and briefly, has accomplished a great deal. An argument, though it be ever so strong, loses half its strength, or more, if stated obscurely or feebly. A compactly wound ball flies farther and strikes harder than a soft one loosely wound. Strength of statement is secured by brevity. It will benefit even experienced advocates to state and restate arguments, now giving them this form, and now that; seldom elaborating, but often filing down. There is, as we have shown, a power in words, and he who is not conscious of this has no business in the ranks of the advocates.[3] A strong argument is most forcible when expressed in a few simple words, for these are the words of power. There is no real strength in numbers, nor in bulk.

Weak arguments, like poor soldiers, fight best under cover. Words are the fortifications that shelter feeble arguments. Well chosen words and beautiful figures often so well shelter weak arguments that they are made to do the work of strong ones. He who has at command only feeble arguments will shelter them by a covering of many words; but he who has strong ones, if he be wise enough to appreciate their strength, will keep them in conspicuous positions in the open field. A fallacy will not bear the light unless draped so heavily that its deformity is hidden, and so the cunning sophist gives to his fallacies many words, so attiring them that their defects and deformities pass unseen. Every one knows that an undue assumption, an evasion, a *non sequitur,* or, indeed, any other sophism, will often escape notice if surrounded by many words and fenced about with collateral propositions; but if stated without the sheltering protection of

[2] The same thing was long before said of Lord Mansfield. Emerson also said of Webster: "In his statement things lay in sunlight. We saw them in order as they were."

[3] One who studies Colonel Ingersoll's speeches will find convincing proof of the power of words.

these auxiliaries of false reasoning it will be detected and exposed with little effort.

Fallacies are most successfuly exposed by driving them into a corner and stripping them of their attire.[4] When once the pursuit is undertaken it should not be abated until the fallacy is caught, held and disrobed; and disrobed it will be when the words which conceal it are torn away. It is not always, however, that an unsound argument is answered by removing the words which conceal its infirmities, for there are unsound arguments, that, no matter what the form in which they are exhibited may be, are plausible and persuasive; but even in such cases the arguments are strengthened by the employment of many words, and to take away these strengthening words is to diminish their force. Whether an unsound argument be plausible or not, the surest and safest way to expose its infirmity is to begin by stripping it to the briefest possible proportions; but with a really strong argument it is radically different. The sophist who has a strong argument to answer is ever careful to obscure and cloud it by words, while he who encounters a fallacy will pursue the opposite course. The one will seek to "darken by words," the other will let in the light by casting out the words that obscure the truth.

The work of exposing a fallacy is more difficult than that of detecting it. Many arguments are clearly perceived to be unsound, and yet their unsoundness is not easily exposed. One who hears the discussions of counsel in judicial contests knows how perplexing it often is to track and bring to light a fallacy that he feels sure is somewhere hidden in the counsel's argument. It is often a work of great difficulty even for a well-trained thinker to exhibit a fallacy, that he is confident pervades an argument, so that other minds can perceive it. It is, indeed,

[4] The advocate may treat fallacies much as Montaigne's doubts were treated by Emerson. "I wish," he says, "to ferret them out of their holes and sun them a little. We must do with them as the police do with old rogues who are shown up to the public at the marshal's office. They will never be so formidable when once they have been identified and registered."

difficult for the thinker himself to get a clear conception of the fallacy, and far more difficult to reproduce his conception so that it can be clearly perceived by others.

A thorough acquaintance with the principles of deductive logic is, perhaps, the surest equipment for the work of exposing fallacies that art can supply.[5] Overladen as the Aristotelian system of logic is with useless subtleties and forms, it is, nevertheless, the greatest source of available knowledge upon this subject that the wisdom of man has created. The logical puzzles of the acute Greeks, although of little intrinsic value, are yet of great value as a study of the methods of detecting and exposing fallacies. To be sure, no art or science can supply substitutes for national powers, but art and science may do much to increase the force and augment the quickness and keenness of those powers. Natural endowments being equal, he will be the quickest and surest detector and exposer of fallacies and sophisms who has given close study to the treatises of the great logical writers. He will best know where to look for fallacies, for he will be informed as to their favorite abiding places. He will best know how to hunt them, for he will have knowledge of the method great thinkers have adopted in pursuing them. He will best know how to expose them, for he will know how to describe them to himself in technical logical terms, and when he has himself clearly apprehended their character he can in ordinary language make it known to other men. What one clearly perceives he can, as a general rule, clearly communicate, but what he perceives obscurely increases in obscurity as it leaves his own mind. A study of the great logical treatises, it may be added, at the expense of a transient digression, greatly promotes the power of stating questions, as well as augments acuteness in pursuing and exposing fallacies, for, as M. Bautain justly says, the logicians "knew how to state a question."[6]

When perplexed by an unsound but plausible argument it is

[5] See Sir William Hamilton's argument in support of this proposition in his work on Logic; also Coleridge's Table Talks, January, 1823.

[6] The Art of Extempore Speaking, 56.

well to state and restate it, and, if the fallacy is perceived, to classify and name it, even if in doing so one is compelled to adopt the cumbersome terminology of the schoolmen, since names secure clearness and vividness of thought. A thing taken from a throng and named is made clear, and may, with comparative ease, be exhibited to other minds. Of course, the advocate who tracks down a fallacy will not employ the scholastic terms in exposing it to the court or jury, since those terms perform their office when they fully exhibit the fallacy to his own mind; but he will, in ordinary language, give its character and expose its faults. If he has studied to a good purpose, and not in a mere perfunctory way, he will be able to effectively point out where and how the argument is inconclusive, for logic teaches him not only what the faults are, but how to meet and expose them. But a superficial acquaintance with logical forms, without a just conception of logical principles, is more likely to betray into error than to lead to truth. One court, at least, misled by presuming that a knowledge of the forms of argument was enough to make it safe to venture to employ the full form of the syllogism, was betrayed into a glaring violation of the rudimentary principles of logic.[7] When a question is of unusual difficulty there is no better method of clearing away the difficulty than by stating the argument in full form, with premises and conclusion arranged in due order.[8]

It is important to know at the outset where the fallacy is. If an officer would succeed in arresting a criminal he must employ the means of discovering the wrong-doer's tarrying place; and so with an advocate who desires to bring a fallacy to judgment, he must first satisfy himself in what place the fallacy is to be found. One who does not know where to search for a fault is not likely to find it. A man who knows little of machinery may be able to perceive that there is a defect somewhere, and yet not be able to discover where it is, nor to determine how it can be rem-

[7] Wilson v. State, 1 Smith (Wis.) 191.

[8] "Logic may be viewed as a machine for combating fallacies." Sidgwick on Fallacies, 11.

edied. One may not hope to successfully detect a fallacy unless he knows where it is to be found. First of all, then, the searcher for a fallacy must determine whether the fallacy is in either of the premises,[9] and if in either, then, in which; or whether it is in the connection assumed between the premises and the conclusion, or whether it is in the conclusion. The lurking place of a fallacy is always revealed by the statement of an argument in full form, but it is not always necessary, by any means, to exhibit it in that form.

In the argument of questions of law and fact the chief business of the advocate is to prove the propositions he asserts. Inference, as we have said, precedes proof, but proof is the ultimate work that must be done in argument. Proof, as we here use the word, means the establishment of a proposition "on a sound basis."[10] There is, as we believe, no valid proof unless the basis is sound, and the conclusion legitimate. The premises, the basis of the argument, may be sound, but there is no proof unless the proposition is securely established on that basis, and it can not thus be established unless it logically results from the premises. If the basis is unsound, or the conclusion is not legitimate, there is, of course, somewhere in the reasoning, an invalidating fallacy.

A rough scheme of division is all that our purpose requires, and we shall not attempt to make an elaborate one. It is sufficient, as we believe, to so classify the objections to arguments that, viewing the subject from the practical side, the nature of the prevailing fallacies in the arguments adduced in the discussions of the forum may be fairly outlined, and the means of detecting and exposing them briefly suggested.

Viewed from the practical side of the subject, the principal objections that may be urged against the validity of the arguments employed in the discussions of the forum seem to be these:

[9] For a recent opinion in which counsel's major premise was said to be fallacious, see State v. Shuler (Ore.), 115 Pac. 1057, 1064, 1065.

[10] Sidgwick on Fallacies, 38.

(1) That there is an illicit assumption of the basis of the argument, or of some part of it; (2) that a term is employed in one sense in one part of the argument and in a different sense in another part; (3) that the question is begged; (4) that a thing is judged by its accidental incidents, and not by its essential properties; (5) that there is not an exhaustive division, or that there is an incomplete enumeration; (6) that the conclusion is asserted upon a defective induction, or upon an imperfect generalization; (7) that the conclusion does not follow from the premises; (8) that the wrong point is answered, or the point in dispute is mistaken; (9) that the weight of objections is unduly adjusted.

Illicit or undue assumptions constitute the most effective weapons of the sophist.[11] The fallacy of illicit assumption is a dangerous one in forensic debates. It appears in many forms, but is almost always hidden by words which prevent it from being clearly seen. Forced into light from the darkness it prefers, it is not always so difficult to conquer; but the real difficulty is to force it from its obscurity. This fallacy is a fruitful source of error, sometimes deceiving the honest investigator and sometimes baffling the honest disputant.

The most insidious form of this fallacy is that in which much more is implied than is expressed. This form of illicit assumption might, with propriety, be named the fallacy of implied illicit assumption. The sophist who employs it states a proposition not broad enough to cover the proposition he professes to prove, and then, as he proceeds, covertly assumes all that is essential to give his proposition the sweep his argument demands. Thus, it is argued that no contract in writing is barred by the six years' statute of limitation, and it is assumed that the contract is in writing, but the evidence proves that the contract is partly written and partly verbal. In this example we have the covert assumption that the contract is in writing, whereas, in legal contemplation, a contract partly written and partly verbal is, in

[11] See State v. Sullivan, 120 Ind. 197, 199, 21 N. E. 1093, 22 N. E. 325.

such cases, entirely an oral contract.[12] In some instances the implied assumption is a double one, thus enabling the disputant, when hard pressed, to shift from one branch to the other. In the example given there are really two assumptions: one, that a contract partly in writing is in law a written contract; the other, that where a contract is partly in writing the six years' statute of limitations does not apply. Take, as a further illustration, a case where the evidence shows that the accused killed the deceased with a deadly weapon. In such a case if the prosecutor should argue that the accused was guilty of murder in the first degree, he would be tacitly assuming that the act was premeditated.

The fallacy of proving only a part of a proposition is really a form of the implied illicit assumption.[13] The disputant who employs the fallacy usually enlarges upon the part established, puts it in various forms, and, by every artifice at command makes it as conspicuous as possible. Having secured attention to the part proved, he endeavors to make it appear that it covers the whole ground, sedulously avoiding reference to the part not covered. This fallacy is more effective when the conclusion is not expressly stated; so the sophist is careful to refrain from any specific statement of the conclusion, and deals only in generalities, except when giving prominence to the part of his proposition that is really established. It is frequently employed in cases where written instruments, or statutes, are under consideration. The sophist, in such cases, selects a passage, or a clause, favorable to his theory, and ignores the parts that oppose it. Few fallacies are more common in forensic debates than this. It appears in so many shapes and forms that we can do little more than describe it, without attempting to illustrate it by examples.

[12] In Sithin v. The Board, 66 Ind. 109, the court was led into error by this assumption, and in The Board v. Shipley, 77 Ind. 553, the error was corrected and the earlier case overruled. See also, Blaine's Political Discussions, 97, 99, for another example of this fallacy, its exposure and overthrow.

[13] Of course, there is no fallacy where it is avowed that part, only, of the proposition is proved.

In dealing with implied illicit assumptions, the first step is to make what is implied in thought take form in words. What is implicit is to be expressed in language. What is implied is, of course, first to be discovered, and this, often, is a work of difficulty, for illicit assumptions are commonly so cleverly disguised that it is not easy to find them. When the discovery is made, the implied assumption is to be given body, so that it may be clearly seen. While it remains implicit in thought, although it may work actively, it is invisible; but, when given body in words, it is perceptible. It is hardly straining our illustration to say that, while the assumption remains implicit in thought, it is a bodiless specter that none can see; but when given expression in words, it takes form and body, so that it may be seen and known.

The process of discovering and exposing this fallacy, when it takes the form of asserting that all is proved when only a part is proved, is made easier by fully and clearly stating the conclusion sought to be established. When this is made clear, it is not so very difficult to show how far short the proof comes of establishing the asserted conclusion.

Illicit assumptions are a prolific source of error in analogical reasoning. On the part of one disputant, it is assumed that there is an essential resemblance between the analogue and the case or proposition it is adduced to maintain, when, in fact, there is some resemblance, but not the resemblance required; on the part of the other, it is denied that there is an essential resemblance, and differences are indicated which do not touch the essential point. It is not necessary that the resemblance should be close upon all points, but it is essential that it should be close upon the material point. Mr. Mill, in his discussion of this subject, says: "Now, an error or fallacy of analogy may occur in two ways. Sometimes it consists in employing an argument of either of the above kinds with correctness, indeed, but overrating its probative force. * * * * But this is only one of the modes of error in the employment of arguments of analogy. There is another more properly deserving the name of

fallacy, namely, when resemblance on one point is inferred from resemblance in another point, though there is not only no evidence to connect the two circumstances by way of causation, but the evidence tends positively to disconnect them." [14]

"The special danger," says Mr. Sidgwick, "of any argument, so far as it relies upon analogy, is the possible existence of unsuspected and essential difference between the things compared. This is the vital point to which the attack should be directed, and which, if we are defending the analogy, it behooves us most to be prepared to guard." [15] The fallacy of asserting that to be an analogy which is not an analogy is conquered by proving that upon the essential points there is not the requisite resemblance. The fallacy of unduly estimating the probative force of the analogy is confuted by proving that the analogy is extended beyond its legitimate effect.

Closely related to the fallacious process we have just discussed is that of fallacy of examples. This fallacy consists in assuming that the supposed case, or the example adduced by way of illustration, is the same in its essential points as the case in judgment. It is a very common practice to invent examples bearing some resemblance to the real case, and covertly assume that the cases are alike, or the resemblance so close that, in principle, or, as the logical phrase runs, in essence, they are the same. An effective method of dealing with this fallacy is to state the conclusion required in the real case, and, after thus exhibiting the point actually in dispute, show the difference between the invented case and the real one. If it can be shown "that the resemblance, even if on the whole real and deep, is not essential for the purpose intended," [16] the fallacy is exposed. An important part of this work, as is sufficiently evident, consists in keeping the real point in issue constantly and plainly in view.

The fallacy which some writers denomiate the fallacy of confusion [17] is, at bottom, as, indeed, most, if not all, the material

[14] Logic, 554; Devey's Logic, 322.
[15] Fallacies, 267.
[16] Sidgwick on Fallacies, 252, 253.
[17] Mills Logic, Chap. VII; McCosh's Logic, 180.

fallacies are, a species or form of the illicit assumption.[18] At the foundation of all material fallacies—and by the term material fallacies is meant a fallacy in the premises or basis of the argument—is an undue assumption, either expressed or implied. Where a wrong cause is assigned for an effect, or an effect attributed to a wrong cause, or a wrong meaning given to a word, or where the question is begged, there is, as an analysis rightly made will disclose, an undue assumption. But it is not important to our purpose, nor is it within the scope of our work, to discuss this subject, and we shall assume that the fallacy of confusion is a species of the fallacy of illicit assumption, and not a distinct fallacy. Mr. Mill asserts that nearly all fallacies may be brought under the head of fallacies of confusion, but treats under that head only such fallacies as arise from an improper use of language.[19] Other writers give a wider sweep to the term, and still others treat fallacies, classified by Mr. Mill as fallacies of confusion, under the head of ambiguous middle.[20] We shall not confine the term fallacies of confusion to verbal fallacies, for we think that there are other forms of the illicit assumption that should properly be ranked as fallacies of confusion.

The fallacy of incomplete discrimination is one of the most common of the forms of the fallacy of confusion. The fallacy of incomplete discrimination has many phases. It occurs where differences that take a case out of the operation of a general rule, or a maxim are concealed, or are not seen, and the rule or maxim is applied to the particular case. It occurs where

[18] Logical writers generally concede that their treatment of fallacies is not strictly scientific, and that the division of the subject usually made in the logical treatise is not accurate. We venture to submit that the fault is in not making the fallacy of undue assumption the genus, and arraying the various forms as the species. Mr. Devey does, indeed, adopt this classification, for he says that fallacies "may be ranked under premise unduly assumed, and irrelevant conclusion." Logic, 304.

[19] Logic, 563.

[20] Whately's Logic, Book III, § 8; Jevon's Logic, 171; McCosh's Logic, 175. Mr. Sidgwick admirably treats this general subject. Fallacies, 170.

maxims are confused with axioms.[21] It occurs where maxims are assumed to be of universal application, when they are only general in their operation.[22] It is present in those cases where a distinction is lost sight of, and the particular case is placed in the wrong class.[23] It is present in the arguments which apply to cases of one class a rule applicable only to cases of a different class; as, for illustration, where a rule applicable only to actions *ex delicto* is applied to actions *ex contractu*.[24] The error in the decision of a noted case—one that is often referred to, and generally condemned—rests upon a failure to discriminate between an agent and an independent contractor.[25] It is tacitly assumed in that case that an independent contractor stands to his employer in the same relation that an agent or servant does, whereas there is an essential difference, for in the one case the employer has no control over the contractor, while in the other the agent or servant is subject to his employer's command. Other cases have been wrongly decided because the courts have failed to make a proper discrimination, and, because of that failure, have illogically extended the rule that an employer is not liable for the acts of his contractor, they having treated it as an universal one, whereas it is only a general one; for there are cases in which he is liable; as, for instance, where the work is intrinsically dangerous, or is a nuisance.[26]

[21] Ram's Legal Judgments (Townshend's ed.), 45.

[22] Bonomi v. Backhouse, 27 Law Jour. (N. S.) 388; Jenkins v. Wheeler, 4 Robt. 475.

[23] Wood v. Milwaukee &c. Co., 32 Wis. 398; Orange Bank v. Brown, 3 Wend. (N. Y.) 158; Van Brocklen v. Sheallie, 140 N. Y. 70, 74, 35 N. E. 415; Walsh v. Chicago &c. Co., 42 Wis. 23, 24 Am. 366. This fallacy misleads those who fail to discriminate between wilfullness and negligence, as Mr. Beach clearly shows. Beach on Contributory Negligence, 67. See also, 3 Elliott on Railroads (2d ed.), § 1251.

[24] Walsh v. Chicago &c. R. Co., 42 Wis. 23, 24 Am. 376.

[25] Bush v. Steenman, 1 B. & P. 404; Conflict of Judicial Decisions, 7.

[26] 1 Shearm. & Redf. on Negligence (4th ed.), § 175. See also, 2 Elliott on Roads and Streets (3d ed.), §§ 814, 815. To the fallacy of incomplete discrimination may be attributed the error, which is found in some of the cases, of exonerating masters entirely from liability to servants for the negligence of others employed in the master's service. The error arises from

The form which the fallacy of incomplete discrimination assumes, when there is an error in applying a general rule to a particular case, is essentially the same as that which some of the logical writers say may not "inaptly be called the misapplication of abstract principles." This form of the fallacy often misleads counsel in the preparation of instructions, for, without justly discriminating differences, they state a general principle, correct in the abstract, but which does not fit the case in hearing.

It is very common for advocates to content themselves with asserting a general principle without proving that it applies to the case which they assume it rules, but, common as the practice is, it is a vicious one, and one that very often brings defeat The error is in assuming as true of the particular case, without limitation, what is true of it only in some respect. Thus, it is true, as a general rule, that all contracts founded on a valuable consideration are valid, and may be enforced; but this general rule would not apply to a case where the statute requires the contract to be in writing, as, for instance, where the promise is to pay the debt of another. To employ another illustration: It is true, as a general rule, that "fraud vitiates everything," and it is also true that within this general rule fall promissory notes; but if, in the particular case, the note has been transferred, for value and before maturity, to a good-faith holder, the rule would not apply. These examples [27] may serve to show the character of the fallacy we have been endeavoring to describe, and to suggest the method of answering or removing it.

The fallacy of incomplete discrimination sometimes consists in illicitly narrowing a principle. The error in this form of the fallacy is, we need hardly say, the reverse of that in the form

a failure to discriminate and note the important element that, where the servant or agent stands in the master's place, all the acts which he performs in discharging the duties of that place are, in law, the acts of the master. Indiana Car Co. v. Parker, 101 Ind. 181; Shearm. & Redf. on Negligence (4th ed.), § 205.

[27] Once, for all, it may be said that examples are chosen because of their brevity and simplicity rather than because of their illustrative force, as it is not within our limits to give examples requiring many words for their statement.

last described. Thus, the counsel for a man accused of murder puts his defense upon the theory of self-defense, and argues that, as the accused was in imminent danger of great bodily harm, he was justified in taking the life of his assailant, but does not limit his proposition by adding to it the qualifying clause, "being himself without fault." This qualifying clause is essential, since, if it be absent, the proposition would include cases where the accused brought on the rencounter, and created the necessity for taking life.

Concerning the detection and exposure of fallacies of incomplete discrimination of the kind we have mentioned, it may be said, in general terms, that the safest process is to discover and affix the essential marks. It is by marks, as we have said, that the essential properties of a thing, [28] whether it be a legal proposition or a fact, are known, and it is the essential or material qualities that the law regards. Marks are the features of a thing, and we can only know and identify a thing by its features. We can not identify a man unless we know his features, although we may know in a general way that he is a man. Nor, pursuing the illustration a little further, can we know a particular tree, as, for instance, the Charter Oak, without knowing its essential marks. So, we may know, generally, that a rule is relevant, but without knowing the marks of a case we can not know whether it falls under the rule; nor can we know whether the case belongs under a rule or under some exception, unless we know its essential marks. [29]

In the argument of questions of fact, the fallacy of incomplete discrimination very often deceives and misleads the reasoner himself, as well as his adversary. Men frequently fail to discriminate between the fact itself and its signs or marks. The books contain cases where men have been convicted because of the fallacy of mistaking the sign for the fact. [30] The

[28] Bowen's Logic, 10. Esser says: "To think is to designate an object through a mark or attribute."

[29] Lotze's Logic, 120.

[30] In the work called "Famous Cases of Circumstantial Evidence," and

logical writers give many illustrations of the "fallacy of mistaking a sign of a thing for the thing itself," [31] but none more striking than those found in the reports. The fallacy under immediate mention is a true type of the fallacy of confusion arising from a defect or error in discrimination, for the sign or evidence of a thing is confused with the thing it is adduced to prove.

In civil cases it often happens that the signs, which are in reality the evidence of an act or occurrence, are assumed to be the act or occurrence itself. Thus, in cases of fraud it is unduly assumed that the badges of fraud constitute the fraud itself, whereas, they do more than indicate or prove the fraud.[32] It may be that the evidence is sufficient to establish the fact in dispute, but it is not the fact itself. It may be, for instance, that, if it were proved that a conspiracy was entered into to defraud creditors by obtaining property for an insolvent buyer by giving him a false credit, it might be safely assumed that the fraud was established; but it could not be assumed without error that the evidence constitutes the fraud. The rules of pleading very clearly recognize the distinction between the facts and the evidence, [33] and this distinction is often important in charging the jury. It would, for instance, be proper to instruct a jury as to the effect of badges of fraud, but it would not be proper to direct them that the badges constitute the fraud.

A kindred fallacy is that of assuming that to be a cause which is not a cause. "In this fallacy," says Mr. Jevons, "we assume that one thing is the cause of another without any sufficient grounds." [34] Archbishop Whately subdivides this fallacy, and makes an independent subdivision of that form of it in which a sign is mistaken for a cause. He gives many striking illus-

in that called "Legal Puzzles," are collected many cases which illustrate this fallacy. Ram on Facts, 289, 439.

[31] Devey's Logic, 328.

[32] Phelps v. Smith, 116 Ind. 384, 17 N. E. 602; Elston v. Castor, 101 Ind. 426; Blish v. Evans, 13 West. (Vt.) 546.

[33] Stephens on Pleading (Heard's ed.), 341n.

[34] Jevon's Logic, 181.

trations, and, among others, gives this: "Nothing is more common than to hear a person state confidently, as from his own experience, that such and such a patient was cured by this or that medicine, whereas all that he absolutely knows is that he took the medicine, and that he recovered." [85] Witnesses very often employ this fallacy, and it is very common in the arguments of advocates.

The form of this fallacy which does most mischief in forensic discussions is the one Mr. De Morgan describes as, "The mistake of imagining necessary connection where there is none, in the way of cause, considered in the widest sense of the word." [86] The illustration generally given by the logical writers is the reasoning of those who concluded that the star Sirius causes the heat which prevails during the time of its ascension. [87] A recent case supplies an apt illustration of this fallacy. [88] In the case referred to, a pit had been dug near the line of a street; the plaintiff, a constable, had a prisoner in his custody, on the way to jail; as they came opposite the pit, the prisoner seized the plaintiff and threw him into it, and it was argued that the town was liable. The fallacy of which we are here speaking caused the sacrifice of many lives during the years when courts permitted persons to be condemned and executed as witches. The proof which good men and great judges accepted as sufficient was based on assumptions of connection between cause and effect so utterly absurd as to seem idiotic to even the most superficial reasoner of this age.

An important and mischievous form of the fallacy of confu-

[85] Logic, Book III, § 14.

[86] Formal Logic, 268. A somewhat humorous example of one phase of this fallacy is supplied by the following anecdote: "What made Columbus think he had discovered a part of Asia?" inquired a searcher after historic truth. "Because he saw the Indians and naturally assumed that he had discovered India," answered the man who is never at a loss for a reason or an explanation.

[87] Port Royal Logic, Part III, Chap. XIX, § 3; Theory of Thought, 292; Devey's Logic, 320.

[88] Alexander v. Town of Newcastle, 115 Ind. 51, 17 N. E. 200, 38 Alb. L. J. 23. See also, Zopfi v. Postal Tel. &c. Co., 60 Fed. 987, 9 C. C. A. 308.

sion arises from an improper use of language. This fallacy has its foundation in a false conception of the meaning of words. False meanings are, however, sometimes purposely attributed to words by sophists eager to carry their point, and in other instances honest but mistaken reasoners give an incorrect meaning to the terms employed in argument. Mr. Mill restricts the term "fallacies of confusion" to verbal fallacies, and after saying that fallacies of confusion are those in which the error is "not so much a false estimate of the probative force of known evidence as an indistinct, indefinite and fluctuating conception of what that evidence is," says: "At the head of these stands that multitudinous body of fallacious reasonings in which the source of error is the ambiguity of terms; when something which is true, if a word be used in a particular sense, is reasoned as if it were true in another sense."[39] Other writers treat this fallacy under the head of "ambiguous middle,"[40] and others under the head of "verbal fallacies."[41]

The fallacies which arise in forensic discussions from the uncertainty of the meaning affixed to words may, to employ the term used by Mr. Mill, be truly said to be "multitudinous." These fallacies go much deeper than mere words, for they often affect great public interests, as well as the most important rights of person and property. The term "verbal fallacies" is, therefore, misleading. The disputes respecting the meaning of words are almost endless, but they go beneath words to things. They arise in the construction of written constitutions, of statutes, of wills, of deeds, and of contracts of every description, and it is no wonder, therefore, that there are phases almost innumerable of the fallacies of this class.[42] It is not to be expected, where the class is so numerous, that in any work, much less in one of the character of ours, the subject can be thoroughly discussed, or many phases of the fallacy examined.

[39] Logic, 563.

[40] Whately's Logic, Book III, § 3; Theory of Thought, 261.

[41] Devey's Logic, 307.

[42] "One-half of the English language," said Baron Alderson, "is interpreted by the text." Delevene v. Parker, 9 Dowl. Pr. C., 245.

The fallacy occurs in many forms. One form is where the reasoner takes a word improperly used and deduces from it an unsound conclusion. Thus, many good men, deceived by the use of the word "license," as applied to dramsellers, argue that it is the grant of a privilege not previously enjoyed, and the enlargement of a right; whereas, the exaction of such a license is a restriction imposed by law in the nature of a tax.[43] The error in this phase of the fallacy consists in carrying to other cases a meaning accidentally given to a word in a particular case, or in a special class of cases. It is a peculiar form of the fallacy of judging a thing by its accidental incidents, rather than by its essential properties. Archbishop Whately very nearly touches the fallacy under immediate mention when he says: "It often happens that one or more of the above rules is violated through men's proneness to introduce into their definitions accidental along with, or instead of, essential circumstances. I mean that the notion they attach to each term and the explanation they would give of it shall embrace some circumstances generally, but not always, connected with the thing they are speaking of, and which might, accordingtly (by the strict account of an accident), 'be absent or present,' the essential character of the subject remaining the same."[44] It may happen that, as to a particular case, there is no error in attributing to a word its accidental meaning. This, of course, is to be determined from the words with which it is associated. It may, in general, be safely assumed that there is a fallacy where words are used as expressive of their accidental meaning; but this assumption is a mere rebuttable presumption that will give way to countervailing evidence. Where the accidental meaning is, without justification, attributed to a word, the most successful method of refuting the fallacy is to so state its essential meaning that its accidental incidents may be clearly perceived, and to keep the essential meaning constantly in view, unclouded by the accidental incidents.

Judging words by their accidental incidents, and not by their essential properties, also occurs where words are taken in a sense

[43] Lutz v. City of Crawfordsville, 109 Ind. 466, 10 N. E. 411.
[44] Logic, Chap. V, § 6.

more literal and limited than the context justifies, or the person who used them intended. What is accidental, and what essential, is to be determined by a close examination of the context, by a consideration of the purpose of the person who employed the words involved in the dispute, and by reference to the object intended to be accomplished. What is accidental in one case may be essential in another. The true rule is that stated by Vattel: "We ought always to affix such a meaning to the expressions as is most suitable to the subject or matter in question."[45] The fallacy which results from a violation of this rule is well illustrated by the argument of the counsel in an old and familiar case, who contended that a statute making it a crime to let blood on the public streets applied to a surgeon who used the lancet to relieve one who was ill.

In discussing the general subject of fallacies of accident, Mr. Jevons thus speaks of the form under immediate mention: "It would be a case of the direct fallacy of accident to infer that a magistrate is justified in using his power to forward his own religious views because every man has a right to inculcate his own opinions."[46] Mr. Hammond supplies an apt illustration by referring to the famous order of General John A. Dix: "If any man hauls down the American flag, shoot him on the spot." In commenting on the illustration, Mr. Hammond says that "It certainly was not the intention of General Dix that every flag should be kept flying night and day, until worn out. Yet a literal interpretation of the order would imply nothing else."[47]

The remedy for the fault of unwarrantably adhering to a rigid literal interpretation is to interpret the words by the occasion and its attendant circumstances. It is not enough to give a mere abstract definition in all cases, for there are many cases in which

[45] Law of Nations, 250.

[46] Logic 177. This author justly says: "Almost all the difficulties which we meet in matters of law and moral duty arise from the impossibility of always ascertaining exactly to what cases a legal or moral rule does or does not extend; hence the interminable differences of opinion among the judges of the land." Ibid, 178.

[47] Lieber's Hermeneutics (Hammond's ed.), 86n.

the discussion should go into the history of the past, and should point to consequences that may arise in the future.[48]

A form of the fallacy which we are discussing, more mischievous and insidious than one who has not observed the mischief it works in forensic discussions would imagine, is that of equivocation. By the fallacy of equivocation, as we here employ the term, is meant the fallacy of using a word in one sense in one part of an argument and in a different sense in another part. An example given by Mr. Jevons of this fallacy is this: "All criminal actions ought to be punished by law; prosecutions for theft are criminal actions; therefore, prosecutions for theft ought to be punished by law."[49] Another and more striking example given by this author is: "He who harms another should be punished; he who communicates an infectious disease to another harms him; therefore, he who communicates an infectious disease to another should be punished." Of this example the author says: "This may, or may not, be held to a correct argument, according to the kinds of actions we should consider to come under the term harm, according as we regard negligence or malice to constitute harm."[50] It is evident that the fault in the argument exhibited in the example may be considered either as one of incomplete discrimination or as one of equivocation.[51] If viewed from the one side it may be referred to the former class, inasmuch as its infirmity arises from a failure to ascertain, by a complete discrimination, what constitutes legal harm; if viewed from the other side it may be referred to the latter class, inasmuch as the fault lies in using the term "harm" as meaning one thing in one part of the argument and a different thing in another part. A like fault is committed when it is argued that a slander is a cause of action; false words spoken of another constitute a slander; therefore, such false words constitute a cause of action. Here, as in

[48] "Definitions," says Mr. Hammond, " are of the utmost importance and greatest influence in law." Lieber's Hermeneutics. (Hammond's ed.), 303.

[49] A lawyer would not call "a prosecution for theft" a criminal action.

[50] Jevons Logic, 171.

[51] Logical writers often declare that "a fallacy may be assigned to this or that class, according to the side from which it is examined."

the former example, the fault may be either that of incomplete discrimination or that of equivocation. But we need not undertake to analyze or classify the fallacy; it is enough to give it as a type that frequently misleads juries, and, indeed, sometimes deceives learned judges.

This fallacy has, more than once, wrongfully secured a verdict for men who have received bodily injuries. Jurors not infrequently reason something like this: An injured man is entitled to recover; this plaintiff is an injured man; this plaintiff is entitled to recover. A similar process of reasoning is sometimes pursued by counsel, and adopted by jurors, in actions for the recovery of damages. It is argued, this man suffered damages; he who suffers damages is entitled to recover; therefore, this man is entitled to recover. In one part of this supposed argument the term "suffered damages" is used as meaning one who has suffered a loss, and in the other part the word "damages" is used to denote what the law awards as compensation to one who has suffered loss from an actionable wrong.

Mr. Mill classes the fallacy commonly called "begging the question" among the fallacies of confusion.[52] Professor Bowen says that the fallacy "consists in assuming, in the course of the argument, the very point which ought to be proved"[53] Another author says: "The fallacy of *petitio principii*, or begging the question, consists either in arguing in a circle or assuming a premise which unfairly implies the conclusion."[54] The qualification expressed by the word "unfairly," as used in Mr. Devey's definition, is an essential one, since every argument necessarily assumes some proposition as true. The denial of this is the denial of the possibility of reasoning, for it is true, as Professor Bowen says, that, "strictly speaking, all valid reasoning proceeds *ex concessio*." He who should attempt to prove everything he asserts would miserably fail. To assert that all propositions require proof is to affirm that men with finite minds are incapable of reasoning. It is, therefore, not every case, by any means, in which it can be said

[52] Logic, 570.
[53] Logic, 294.
[54] Devey's Logic, 326.

that the assumption of a proposition begs the question. The assumption does beg the question, however, when it unwarrantably asserts, either expressly or impliedly, that the conclusion is proved, by stating in other words the conclusion itself. All fallacies imply something of unfairness, although not every one who employs them is conscious of that fact. When the question is begged the reasoner unfairly assumes that what he brings forward as proof of the conclusion is not the conclusion, when, in truth, it is the conclusion differently expressed. An example of this fallacy, often given by logical writers, is: "The loadstone attracts iron because of its magnetic properties." The fallacy is one often found in the arguments of counsel and in the opinions of the courts. The fallacy is much more deceptive than most men imagine. Mr. Mill justly says: "The employment as proof of a proposition of that on which it is itself dependent for proof, by no means implies the degree of mental imbecility which might at first be supposed."[55]

The fallacy of which we are speaking occurs in many forms. Thus, it is argued that the court has jurisdiction because it has authority to hear and determine the cause. Again, it is argued that the crime of the accused is atrocious; that insane men commit atrocious crimes, and the atrocious crime of the accused is the act of an insane man. Still again, it is argued that a man without testamentary capacity cannot make a will; the testator had not a disposing mind, and, therefore, could not make a valid will. In other cases it has been argued that a statute is to be construed so as to effect the intention of its framers, and in this instance it will effect the intention of the framers of the statute to construe it as authorizing a corporation to trade in lands; therefore, the corporation may trade in lands. In this last example, it may be well enough to suggest, the only disputed question was

[55] Logic, 571. The examples given by way of illustration do not convey an adequate conception of this fallacy, nor, indeed, can they convey a just conception of any fallacy. As Mr. Sidgwick says: "Actual arguments are usually longer, more complex and less explicit than those which are required for illustration." Fallacies, 196.

begged, namely, whether it was the intention of the framers of the statute to authorize the corporation to trade in lands. Another and simpler example is that of the disputant who, in a case where the question is as to the execution of a promissory note, argues that the note is the note of the defendant because his name is signed to it. The maxim, "A matter the validity of which is at issue in legal proceedings can not be set up as a bar thereto,"[56] is really directed against the fallacy of begging the question, since to permit a litigant to employ, as proof, the very thing in dispute would be to allow him to beg the question. Mr. Broom gives, as an illustration of the application of the maxim, this decision: "Where a man does not appear on a vicious proceeding, he is not to be held to have waived that very objection which is a legitimate cause of his non-appearance."[57] It is quite clear that this decision does nothing more than refuse to allow the plaintiff to beg the question in dispute.

The "vicious circle," as it is called, is a form of the *petitio principii*. It is not a distinct fallacy, but simply a wider circuit than that traveled in when the question is directly begged. The fallacy in this form is, it is hardly necessary to suggest, more likely to escape detection than when the premises and conclusions are not far separated. The adroit sophist does not array the premises and conclusion in close proximity; on the contrary, he is careful to keep them as wide apart as he can. He generally commences at the outer line of the circle and moves inward, never stating, if he can avoid it, in clear terms, the conclusion he asserts, but doing all that words will enable him to do to disguise and cloud his procedure.

Mr. Mill says: "The most effectual way, in fact, of exposing a *petitio principii*, when circumstances allow of it, is by challenging the reasoner to prove his premises, which, if he attempts to do, he is necessarily driven into arguing in a circle."[58] We think that a somewhat fuller explanation of the method of

[56] Broom's Legal Max., 167.
[57] Ibid, 168.
[58] Logic, 572.

exposing the fallacy may be stated. We venture to suggest that the surest method is, first of all, to narrow the circle to its true limits, eliminating all merely immaterial matter, and condensing all that is material into the smallest possible compass, then to state fully the conclusion and the proposition adduced in its support, and, finally, to make plain the identity of the propositions. The chief thing is to make it appear that what is brought forward as proof is essentially the same as the thing it is assumed that it proves. In other words, to identify the proof with the thing to be proved.[59]

Another species of the fallacies of confusion demands notice, and these fallacies, for want of a better name, we are bold enough to call the fallacies of experience.[60] The fallacies of experience are those which result where reasoners misjudge their own experience. This may occur in at least two forms: First, by giving to the reasoner's own experience a wider sweep than it is of right entitled to. Second, by unduly limiting all experience to the reasoner's own experience.

The first of these fallacies has various phases. One phase is presented in a case where a man assumes that he knows a thing from experience when he has inferred it, and only knows from experience some fact or facts directly or remotely connected with it. This phase is illustrated by the reasoning of Sir Kenelm Digby respecting his famous powder. Of this remedy, an author quoted by Mr. Mill writes thus: "Whenever any wound had been inflicted this powder was applied to the weapon that had inflicted it, which was, moreover, covered with ointment and dressed two or three times a day. The wound itself, in the mean time, was directed to be brought together and carefully bound up with clean linen rags; but above all to be let alone for seven days, at the end of which period the bandages were to be removed, when the wound was generally found perfectly united. The triumph of the cure was decreed to the sympathetic

[59] When we reach the foundation of this fallacy it will be found, as we have intimated, to be really a form of the illicit assumption.

[60] We do this by virtue of what Mr. Mill says is the right of every author, that is, to give a provisional definiton of a subject. Logic, 18.

powder which had been so assiduously applied to the weapon; whereas, it is hardly necessary to observe that the promptness of the cure depended on the total exclusion of air from the wound, and upon the sanitive operations of nature not having received any officious interference of art."[61] The mistake made by Sir Kenelm and his disciples was that of assuming that they knew from experience that the powder applied to the weapon cured the wound, whereas, all that they did know was that the wound healed.[62] This mistake is one that men who profess to speak from experience very often make, for often all that they really know is the effect, and not the cause. Thus, it was assumed in one noted case that a man died from poison, when all that was really known was that he died. Subsequent developments in medical science did, in fact, strongly tend to prove that he died from natural causes. But the error we have pointed out is not the only one, by any means, caused by men's giving an unduly wide sweep to their own experience. It happens very often that men fallaciously measure the acts of others by an experience of their own much larger than others could possibly have. Thus, an astronomer would err if he should assume that an uneducated man was not a sensible one because he had no knowledge of the number and magnitude of the stars and planets that traverse the "limitless realms of space." A skilful mechanic would err who should assume that a man knowing little of mechanics could determine where a defect was in a complicated machine.

The second form of the fallacy of experience is illustrated by the case of a man refusing to believe that a motive was sufficient to induce another to perform a designated act. Criminals have been acquitted because jurors have reasoned that the motive was not sufficient to induce a man to commit a crime, taking as their sole guide their own experience, and concluding that, as they know from their experience that the motive would not

[61] Mill's Logic, 543.

[62] It is to the fact that wounds and diseases are cured by nature's power when they are let alone, rather than to men's accounts and explanations of the cure, which they assume to give from experience, that we may most confidently look for what are so often said to be mysterious cures.

have influenced them, it did not influence the accused. On the other hand, men have been denied the credit of a good act because jurors, judging from their own experience, have not attributed it to the just motives which impelled its performance.[63] Witnesses have been misjudged because jurors, reasoning solely from their own experience, have concluded that the temptation was such as they themselves would have yielded to, and, therefore, that the witnesses had yielded to it, as they would have done. There are men who would bring all "things within the limits of their own little world," and these are the men who reject all things that lie beyond the limits of their own experience. Puck's assertion that he would put "a girdle around the earth in forty minutes," was for many generations looked upon as the wild dream of a fairy, or, rather, as a poet's airy fancy, but Morse's plodding, painstaking work made the poet's fancy a cold fact.[64] His invention, like that of Edison's, transcends experience, at least the experience upon which jurors so confidently, and often so erringly, rely.

Where the fallacy to be exposed is that of wrongly attributing the result of inference to knowledge derived from experience, the course naturally indicated is, to prove that what is supposed to be derived from experience is really nothing more than inference. Where an unduly wide sweep is at the bottom of the fallacy it is best overthrown by showing that only men

[63] In commenting on Bacon's essay on Cunning, Archbishop Whately, speaking of a knave, says: "He can form no notion of a nature nobler than his own. He is like the goats on Robinson Crusoe's island, who saw everything below them, but very imperfectly what was above them, so that Robinson Crusoe could never get at them from the valleys, but when he came upon them from the hilltop took them quite by surprise."

[64] Our meaning is well illustrated by an historical fact. Governor Wallace, the father of the author of "Ben-Hur," was defeated for re-election to congress because he voted to appropriate $30,000 to aid Morse in perfecting his electric telegraph. The governor's opponent appealed to the experience of the electors, whether a man who had no more judgment than to vote for such a large appropriation for such a wild scheme was fit to represent them in congress, and they answered his appeal by giving him their votes.

of a class, men who are, in fact, specialists, can justly claim so large an experience, and that the person whose acts are involved could not have possessed the experience of the specialist. Thus, if a witness professes himself ignorant of a defect in a machine which another with a wider knowledge of machinery would have seen, an adverse conclusion may be averted by showing why the one should not have a wide experience, and why the other should. If the fallacy results from unduly limiting the sweep of experience the remedy is to prove the inadequacy of the measure, and this is as well done, perhaps, by showing what the experience of men with greater opportunities is, and why it is that the sweep of experience depends on opportunity. Thus, if the motive attributed to a witness be not, within the ordinary experience of men, an adequate one, it may be shown that many men have been influenced by like motives to do similar things. This method may, of course, require an examination of the character of the person whose acts are under discussion, as well as his opportunities, and the circumstances attending the act involved in the investigation.

Many of the unsound arguments that advocates employ result from judging things by their accidental incidents, and not by their essential properties. The authors of the Port Royal Logic, in discussing this fallacy, say: "This sophism is called in the schools *fallacia accidentis,* which is when we draw a simple, unrestricted and absolute conclusion from what is true only by accident."[65] Professor Bowen says of the fallacy that, "It consists in inferring something as true of the subject simply, or without limitation, which is true of it only in some respects."[66] Accidental qualities are in one premise attributed to the subject, while in the other the subject is taken in its unlimited extent, that is, as possessing the essential properties inseparable from it. The standard example given in the books is this: "He who calls you a man speaks truly; he who calls you a knave calls you a man; therefore, he who calls you a knave speaks truly."

[65] Port Royal Logic, Part III, Chap. XIX, § 5.
[66] Bowen's Logic, 283.

The fault in the argument contained in this example is in taking the subject in its unlimited extent in the one premise, and in the other in only its partial extent; for a subject is taken in its partial extent unless it is judged by its essential properties. Each accidental incident added to a subject narrows it. In the example quoted, man is the genus, with all the essential properties of a genus, while the quality of being a knave is only an accidental incident, and by adding this incident the universality of the term "man" is destroyed. If a disputant should argue that, he who says you are a man speaks truly, he who says you are a witness says you are a man; therefore, he who says you are a witness speaks truly, he would unwarrantably limit the subject man by assigning to it the accident of being a witness, for it is not true that all men are witnesses, nor even that the same individual man is at all times a witness. We may, without introducing a new element, affirm of one man what may be affirmed of all men as an essential property; for example, we may affirm of every man that he is mortal, but we can not affirm of one man merely accidental incidents without introducing a new element. Thus, we might justly affirm that the witness is mortal without assuming anything more than that he is a man, but we could not logically assert that he is a knavish witness without the introduction of an additional premise attributing that quality to him. It is to be noted, however, that the special case may make a thing essential that is in general accidental. We should misapply, in many instances, the rule that in the abstract is a general and correct one, if we lost sight of the qualities which the special case makes essential. For example, it is the abstract rule that all conveyances of land must be in writing, and no title will pass except by a written conveyance, yet, if we applied that rule to a special case where possession was taken of land in part performance of an oral contract, we should err. Special cases may contain modifying elements which may make a general rule inapplicable, and when this is so what would otherwise be accidental becomes essential in the particular instance. The error of applying general rules to special

cases may be traced to the implied illicit assumption that by no possibility can there be any modifying circumstances, while the opposite fallacy, that of attributing accidental incidents to every instance, may be traced, by an ultimate analysis to the implied illicit assumption that what is accidentally true in one instance is necessarily true in all.

Reasoners are perplexed, and hearers misled, by the fallacy of incomplete division. The sophist whose purpose is to deceive makes an incomplete division, and, assuming that it is complete, that is, that it exhausts the subject, affirms that the thing in dispute does not exist, or is not true, because it does not fall within one of his divisions. The essential elements of this fallacy are the imperfect division and the assumption that it is perfect and exhaustive. Thus, for example, it is argued that a void sale can not be ratified, but all sales are either void or valid; this sale is not valid; therefore, this sale is void, and cannot be ratified. The fault in this argument is that the division is not exhaustive, for there is a third class of sales, viz.: those that are voidable; and voidable sales may be ratified.

Uberweg supplies a very striking illustration of this fallacy. "A very good example," says the professor, "is afforded by the lunacy physician, Maximilia Jacobi, whose decision was very famous in its day. When examining the mental condition of a criminal, Reina Stockhausen, who had been brought to his establishment, he declared that he was not insane, but quite able to account for his own actions, because his case did not correspond to any of the six forms into which he himself had classified mental diseases. He thus overlooked mixed forms. When brought to the house of correction the patient soon gave evidence of his insanity."[67] A similar fault is found in this example: The plaintiff was negligent if he attempted to cross the broken bridge in the darkness; he was negligent if he attempted to cross in daylight; either he attempted to cross in the darkness or in the daylight; therefore, he was, in any event, negligent. The fault is in omitting the important element of

[67] Uberweg's Logic, 533.

knowledge, for if the plaintiff had no knowledge of the danger he was not necessarily negligent in attempting to cross the bridge in the darkness.

Many of the logical and legal puzzles may be solved by making a complete division. The famous case of Bullum *v.* Boatum, which so perplexed the old judges, may be decided by making a third division, that of contributory negligence. If the man who tied his boat with straw was negligent, he could not recover; if the man who let his bull run at large was negligent, he could not maintain an action. Herman Lotze suggests that the old puzzle presented by the suit of Protagoras against his pupil, eualthus, may be solved by a similar method. Speaking of this puzzle, the professor says: "Eualthus is to pay for the instruction he has received as soon as he wins his first case, but as he engages in no suit Protagoras gets nothing, and sues him on that account. Now, whether Eualthus wins or loses this suit the verdict must, in any case, either oblige him to do that which the contract releases him from doing, or release him from doing that which the contract obliges him to do. Various solutions of the difficulty have been attempted on the supposition that Eualthus is allowed to win his first suit because he has won no previous suit, and so had not yet become obliged to pay. It was open to Protagoras to institute a fresh suit, which must have this time led to his pupil being condemned to pay.[68] This would be shifting an absurdity off logic in order to make a present of it to jurisprudence. I will not anticipate the decision of the latter, but I suspect it would say that in acting as he did Eualthus had fraudulently prevented a certain condition from being realized, according to which he would have been forced to fulfill an obligation."[69] The author rightly suggests the fault, for the division omits the class of cases where performance is prevented by the wrong of the defendant.

[68] The doctrine of *res adjudicata* would prevent a second action on the same cause of action.

[69] Lotze's Logic, 296. Protagoras would have a good cause of action if placed on the true theory of the case, but he could not recover on the theory on which he proceeded.

An argument stated in the form of a dilemma is very forcible. It is a very strong way of putting a thing, and is often used in legal arguments and opinions.[70] Perhaps no form in which a fallacious argument can be put is so perplexing to an untrained reasoner as that of the dilemma. The fallacy in a dilemma is not so quickly seen as in many other forms of invalid arguments, because it lies beneath the surface, as one may say, and must be dug out before it can be clearly perceived. The reasoner who finds himself confronted by an argument in the form of a dilemma will be wise, if, first of all, he examines and tests the division. The horns of a dilemma are formidable when the division is exhaustively made, but otherwise they are not. Indeed, there are no real horns, although there may be apparent ones, where there is an incomplete division.[71]

The fallacy of incomplete enumeration is very nearly allied to that of incomplete division. The authors of the Port Royal Logic say of this fallacy that, "There is scarcely any vice of reasoning into which able men fall more easily than that of making imperfect enumerations, and of not sufficiently considering all the ways in which a thing may exist, or take place, which leads them to conclude, rashly, either that it does not exist, because it does not exist in a certain way, though it may exist in another, or that it exists in such and such a way, although it may still be in another way which they have not considered."[72] It is evident from this description that the fallacy may arise from an incomplete division, from an incomplete discrimination, or from judging a thing by its accidental incidents, and not its essential prop-

[70] Nugent v. Smith, L. R. 1 C. P. D. 428, copied in 18 Am. 618n, 621; Wilkinson v. Fairlie, 2 Am. L. Reg. (N. S.), 244; Hewitt v. Powers, 84 Ind. 300.

[71] A useless or overburdened division may produce confusion, but it can hardly be said to be a fallacy. A division too broad to be of practical utility was thus referred to by counsel in Replow v. Hodges, 3 H. L. Cases 79: "It is difficult to suppose any species of profits which the phrase 'certain or uncertain profits' would not comprehend—like Sinclair's well-known division of sleeping into two sorts, namely, sleeping with or sleeping without nightcaps."

[72] Port Royal Logic, Part III, Chap. XIX, § 4.

erties. When the enumeration is inadequate, additions may be made to it and the error corrected. Thus, if it be argued that the accused committed the murder because he was at the place where the murder was committed, and had in his hand the weapon with which the deceased was slain, the enumeration would be incomplete, because it omits the elements of malice, purpose, and intent. The most deceptive form of this fallacy is, perhaps, that in which the element of time is omitted. It is assumed, for example, that this defendant had knowledge of a defect in a highway, and, notwithstanding this knowledge, attempted to travel upon it; but the fact that he had knowledge before he attempted to cross it is omitted from the enumeration. Lotze, in referring to the old puzzle of the crocodile, suggests, though he does not very fully develop his suggestion, that the puzzle may be solved by making the enumeration complete.[73] In many forensic contests a difficulty may often be removed by enumerating time as one of the essential elements of the matter in dispute. Thus, time may be of the essence, and neither accidental nor immaterial, in the case of an alibi, in the case of a homicide, in the case of a larceny, and in cases of fraud, as well as in many other cases.

A cause of error, both in discussions of questions of law and questions of fact, is the failure of the disputants to make the inductions upon which they proceed complete or perfect. Disputants often gather one of two instances and from them educe a general conclusion, when, in fact, the instances are wholly insuficient in numbers to warrant any general conclusion.[74] Other disputants gather anomalous or peculiar cases, and upon them, as instances rightly belonging in a line of induction, assert a general conclusion, whereas the only cases relevant or material are those which are unmarked by any essential peculiarity. Still others fall into error by gathering instances and reasoning from them without any undergirding general law binding them to-

[73] Lotze's Logic, 295.

[74] This is the fallacy of those who oppose the jury system; they collect only the cases where verdicts were wrong, omitting entirely the vast number in which they were right.

gether, or enabling the disputant to proceed upon the assumption of uniformity. In the form first described the disputant who adopts it would be in error, because the few instances he collects are not sufficient to establish any general rule. One who proceeds in that way simply reasons from particulars without giving any guaranty that the particulars are in numbers sufficient to warrant any other conclusion than that there are in existence the particulars he enumerates, and that there is a resemblance between them. Indeed, there is not always a guaranty that there is a resemblance. If, in a suit to set aside a fraudulent conveyance, an advocate should collect two badges of fraud, as, for instance, that there were creditors of the grantor, and that the grantor was the father of the grantee, he would be in error if he should conclude that the conveyance was fraudulent, for his instances would be neither sufficient in their numbers nor close in their resemblance.

In the second form described the disputant would be in error, because peculiar or anomalous cases cannot prove a general rule. Magnus Troil was in error when he asserted as a general rule that one-handled plows were the best, and instanced as proof the case of one-armed Neil of Lupness.[75] A similar error is that of the advocate who should assert that parol evidence may destroy the conveying part of a deed, and adduce as an instance supporting his assertion the exceptional cases holding that a deed absolute on its face may be shown to be a mortgage.

The third form described is one that often misleads case lawyers. Lawyers of that class collect cases and assume that they assert the law, losing sight of the fact that there can be no valid induction without an underlying general principle, authorizing the inference that what is true in the instances specified is true in all similar instances.[76] In other words, they leave out of con-

[75] "Tell me," said the Udaller, "how it were possible for Neil of Lupness, that lost one arm by his fall from the crag of Nekbrekan, to manage a plow with two handles."

[76] We have referred to this law of induction at another place. See Mill's Logic, 223.

sideration the important facts that we can not leap from case to case without the aid of the fundamental law of uniformity.

It is very difficult to establish the line between the fallacy of defective induction and the fallacy of imperfect generalization, but as our object is to treat fallacies in a practical method, it is not so important that we classify them correctly as it is that we so describe them that it will not be difficult to recognize them. In induction, as the logical writers generally assert, we "rise from the examination of many particular things to the knowledge of a general truth,"[77] and we make our ascent by collecting numbers of instances and tracing resemblances. "In our progress from the particular to the general, induction proceeds upon the principle that what belongs to many individuals of the same kind also, probably, belongs to all other individuals of the same kind."[78] The object of generalization is, according to Dr. McCosh, to form "a class or head embracing all objects possessing the common attribute or attributes."[79] It appears, from this view of the subject, that in generalization we do not proceed as we do in induction, for we abstract differences for the purpose of forming a general class under which many individuals may be placed, while in induction we gather instances for the purpose of proving, or establishing, a general conclusion. If there is an error in abstracting the differences, or in uniting the attributes, the fallacy is that of generalization. Thus, if we should rank as members of the same class a contract for the payment of a horse with a contract for the payment for services in bringing about a marriage, the error would be in generalizing. So, if we should rank with a contract for the purchase-money of land a claim for damages for fraudulent representations, the error would be of the same general character. The fault in generalization is generally to be attributed to a neglect of differences. Mr. Sidgwick says: "The attack on a generalization most usefully takes the shape of an attempt, either directly or indirectly, to point out

[77] Port Royal Logic, 265.
[78] Bowen's Logic, 381; Mill's Logic, 210; McCosh's Logic, 261.
[79] McCosh's Logic, 23.

hidden circumstances in the facts observed, or, at the least, to point out that the analysis has not been a remarkably searching one."[80]

Both premises of an argument may be true, and yet no valid conclusion result. The conclusion is not established unless it legitimately results from the premises. The fallacy of which we are speaking "is better understood by the familiar phrase *non sequitur*. We may apply this name to any argument which is of so loose and inconsequent a character that no one can discover any cogency in it."[81] But it is not every argument in which the conclusion does not logically result from the premises that is so inconsequent as to be incapable of deceiving; on the contrary, some invalid arguments of this kind are so adroitly framed as to require a careful examination to discover their infirmity. An apt example of this fallacy is supplied by a reported case.[82] It is a fallacy very commonly employed by advocates, and sometimes escapes detection, although one who carefull analyzes an argument need not be deceived by it.

It is not uncommon for advocates to mistake the point in dispute, and answer to the wrong point. In many instances there is an honest mistake as to the real point in issue; in more, the sophist, finding that if he keeps to the point he will be defeated, assumes to answer that point, but actually answers some other.[83] This fallacy closely resembles the fault in pleading known as a departure, for the disputant departs from the issue originally tendered. In some instances there is really no issue joined, for the one side argues one point and the other side argues another and different one. The fallacy is much more deceptive than the careless thinker imagines. Veiled in words carefully chosen, a proposition is made to appear so much like one it merely resembles that the sophism escapes undetected.

In a case where a married woman made an affidavit that the

[80] Fallacies, 280.

[81] Jevon's Logic, 181.

[82] Commissioners v. Miller, 7 Kan. 478, 12 Am. 425-454.

[83] Bowen's Logic, 298; Devey's Logic, 331; Whately's Logic, Book III, § 15.

mortgage that she had executed was not to secure a debt of her husband, the counsel argued that the statute prohibited her from making a contract as surety, and that, as she could not be estopped to deny her capacity to contract, the statements in the affidavit did not operate to create an estoppel. This was a mistake of the point in dispute, for the point in dispute was as to the character of the contract she had entered into, and whether she could be estopped from denying what she had previously sworn the contract was.[84] In another case the point in dispute was as to the capacity of a mortgagor living in one state to execute a mortgage upon land lying in another, and counsel argued that contracts should be construed according to the law of the place where they were made. The error in this argument was in mistaking the point in issue, for that was whether the law of the state where the land was situated determined the question of the capacity to execute the mortgage.[85] Proving that the law of the place where the contract was made furnished the rule for the construction of the contract, was not proving the point in dispute.

Objections urged against a proposition do not necessarily overturn it, for the question is not whether some objections may be urged against a proposition, but whether the objections outweigh the reasons which may be urged in its support.[86] It is common for a disputant to suggest some objections to a proposition and assume that they overthrow it, when, if the proposition is impartially considered, and the reasons for and against it are justly weighed, the former will greatly predominate. There are very few propositions, if, indeed, a single one, in any science, to which some plausible objection may not be urged; and he who looks only to the objections is quite sure to go astray.[87] An ad-

[84] Ward v. Berkshire Life Ins. Co., 108 Ind. 301, 9 N. E. 361.

[85] Swank v. Hufnagle, 111 Ind. 453, 454, 12 N. E. 303.

[86] McCosh's Logic, 187; City of Lafayette v. Nagle, 113 Ind. 425, 15

[87] "As for probabilities," says Hooker, "what thing was ever set down so agreeable with sound reason, but that some probable show against it might not be made?" Archbishop Whately admirably discusses this subject. Logic, Book III, § 17.

justment of the objections is essential to a just conclusion on all propositions of law, since the mere fact that objections may be suggested proves no more than that objections do exist, and this might be proved against almost every conceivable legal proposition. One great reason why courts are misled where one advocate is abler than the other is that the abler states objections which bewilder the weaker. It is not necessary, nor is it expedient, to attempt to overthrow every objection urged. It is, in general, better to state the reasons which outweigh the objections.

An artifice not uncommon in forensic discussions is that of truthfully stating a series of facts, but suppressing one, or more, of the controlling ones. The cunning advocate who resorts to this artifice usually takes pains to conceal his unfairness by an air of sincerity, and to parade his apparent admissions as an evidence of candor. In one case, the evidence was that the defendant had paid full value for land conveyed to him, but before paying the purchase-money had received notice that the plaintiff was the owner of the property. In the argument of the case, his crafty counsel dwelt upon the payment of the money, discussed at much length the evidence as to the value of the property, but entirely suppressed the fact that the defendant received notice of the plaintiff's rights before the money was paid, and his artifice was successful, for his client obtained a verdict. An example of a somewhat different kind may better illustrate the character of the artifice of which we are speaking. "A man," says Mr. Venn, "once pointed to a small target chalked upon a door, the target having a bullet-hole through the center of it, and surprised some spectators by declaring that he had fired that shot from an old fowling-piece at a distance of a hundred yards. His statement was true enough, but he suppressed a rather important fact. The shot had really been aimed, in a general way, at the barn door, and had hit it; the target was afterward chalked round the spot where the bullet struck.[88]

[88] Logic of Chance, 360. "Men," says Bacon, "mark when they hit but never mark when they miss."

In conjecturing where an artifice lurks, it is important to bear in mind that it is no uncommon thing for the cunning sophist to suppress a factor. The honest reasoner is, indeed, often misled by overlooking some factor that completely nullifies the validity of his reasoning. The omission of a material factor creates a mental illusion of a very deceptive character.[89] One who loses sight of an important element gets only a partial view of the thing he is investigating or discussing. In the argument by example it is very common to omit some factor, thus completely destroying the resemblance between the thing to be proved and the example adduced as proof. This is true of the argument by analogy. Facts are made to fit a theory or an hypothesis, by the sophist, by suppressing a factor much in the same way that an accountant makes his books balance by suppressing a figure. Cases are made to seem to be in effect the same by suppressing a factor that, when given proper weight, radically changes the effect of the case cited as authority for the position taken. The remedy for this evil is to state, and array in prominent positions, all the material factors of the cited case; that is, extract from it and make conspicuous all the considerations that exerted a material influence upon the judgment of the court. A partial view, caused by a failure to consider all the material factors, may, by accident, lead to a correct conclusion, but it will only be by accident, for, without a full complement of factors, there can be no assurance that the argument is sound.

An artifice not unfrequently resorted to is that of introducing, as of course, into a train of reasoning, some covert assumption, not, perhaps, important in itself, but which, when united with other elements, exerts an important influence upon the reasoning.[90] It is common for an advocate to assume that a witness has stated a thing which the advocate has himself inferred or imagined. So, too, it is common to assume without expressly affirming it, that to be the settled law which is not the law. The crafty

[89] Sully on Illusions, 336.
[90] Whately's Logic, Book III, § 6.

reasoner is usually careful not to make a direct assertion, but to assume as well known and indisputable a proposition which is not supported by principle or authority. The proposition is generally stated, when any express statement at all is made, as a proposition which no one would think of disputing. The words and manner are generally those of easy confidence, and the assumption is appartently carelessly made. The purpose of the sophist who pursues this course is to keep his adversary's attention from the point assumed. Sometimes a disputant is shamed into conceding the proposition assumed. Old advocates deceive inexperienced ones by confidently assuming propositions, and asserting, not, indeed, in express words, but by manner and method, that one who should controvert them would simply betray his ignorance. "Sometimes," says Mr. Devey, "the groundless statement is introduced as 'a well-known fact, universally admitted,' or 'a circumstance not a little remarkable.' "[91]

An artifice closely akin to that of overlooking or omitting a factor is that of asserting as a fact something that has not been proved, or of asserting as a proved fact some deduction made by the advocate himself. To the same general class may be assigned the artifice of assuming to repeat the testimony of a witness, and by a change in the words, or by an unfair emphasis, giving them a meaning different from that which the witness meant to convey. A slight change in the language of a witness, or even in the emphasis, very often gives a radically different effect to the testimony.[92]

What is usually called the fallacy of reference is nothing more than the artifice of mentioning, as in point, many authorities which have, in fact, no bearing upon the point in dispute.[93]

[91] Devey's Logic, 313.

[92] "Jeremy Bentham, it is said, so feared being misled by false accent that the person employed to read for him was required to maintain a monotone." Theory of Thought, 269; Jevon's Logic, 174. Silas Weg would hardly have been acceptable to Bentham as a reader.

[93] In Eaton v. Boston &c. R. R. Co., 51 N. H. 504, 12 Am. 147, the court said: "The error in question originates in a fallacy of reference." We think, however, the fallacy to which the court referred was a fallacy of

Archbishop Whately says, in speaking of the fallacy of reference, that, "The usual artifice, therefore, is merely to give references to them, trusting that nineteen out of twenty readers will never take the trouble of turning to the passages, but, taking for granted that they afford each some degree of confirmation to what is maintained, will be overawed by seeing every assertion supported."[94] The skillful sophist usually refers to well-known and ancient authors, and intimates that it is surprising that any one should question their judgment and wisdom. Very often the purpose is veiled by an air of indifference, and sometimes it is artfully concealed by a denunciation of the person who has the assurance to question the soundness of the doctrines asserted by the sages of the law. In most instances the fallacy of answering to the wrong point is called to the aid of this artifice. A doctrine somewhat like that involved in the pending controversy, but still essentially different from it, is stated, and authorities are produced establishing that doctrine. This sophistical process deceives by skillfully concealing the points of difference between the doctrine involved in the case in hearing and that artfully stated as the doctrine involved in the dispute. The person against whom this fallacious reasoning is directed will, if he is prudent and wise, state with the utmost clearness the real point in dispute, the principle applicable to it, and the points in which that principle differs from that asserted by the authorities cited against him.

A disputant sometimes resorts to the artifice of stating objections to his own arguments. Aristotle says of a disputant: "Again, it behooves him sometimes to object to himself, since the respondents have no suspicion toward such as appear to argue justly."[95] The purpose of this artifice is two-fold: that of making it appear that the disputant is fair and candid, and that of making it seem that, although there are some plausible objec-

incomplete discrimination, inasmuch as counsel failed to discriminate points of difference.

[94] Whately's Logic, Book III, § 14.

[95] Organon, Book VIII, Chap. I.

tions to his argument, they are not valid. The sophist who pursues this course selects weak but plausible objections, and, having disposed of them, assumes, with an air of triumph, that no valid objections exist. This course is sometimes changed so as to state objections so plausible as to mislead the respondent, and induce him to accept them as strong, and fritter away his time in the vain effort to make them seem really formidable.

Another artifice, not very unlike that just mentioned, is that of stating propositions for an adversary and then demolishing them.[96] The sophist assumes that the propositions stated by him are those asserted on the other side, and, as such, he attacks and overthrows them. The artifice is the more dangerous when the propositions stated as those of the adversary bear a resemblance to those really asserted, and cunning men do sometimes make it seem that there is identity where, in truth, there is none. Another form of this artifice is that of asserting for the opposite side doctrines so vicious and unjust as to arouse indignation, or to supply their own refutation. Prejudice that will "not down" has, unquestionably, often been created against a cause by attributing to its supporters unjust and evil doctrines. If it be true, as some authors assert, that the object of Machiavelli was to bring into disrepute the doctrines which he professed to defend, and which he attributed to princes, his success was very great.[97]

In discussing questions of fact the sophist very often, by an unfair process of dissection, attacks his adversary's argument. Mr. Bain thus describes the process: "In a court of law, when a strong case of combined probabilities is made out, the opposing counsel will comment on the probabilities separately, showing their insufficiency in the detached state, and trying to prevent the jury from attending to their cumulative force."[98] As every one

[96] Analytical Outlines (Gill), 54.

[97] As Machiavelli was a man of spotless character, greatly respected by his countrymen, and an intense republican, it is not without reason that it is contended that his object was to overthrow monarchical government and establish a republic, and that to effect this object he exposed the evils of princely rule while professing to defend the system.

[98] Bain's Rhetoric, 236. John C. Spencer's argument on the prosecution

knows, circumstances are often strong when united, but weak when disconnected, and the sophist who can successfully disconnect and detach them, strips a case of much of its strength. The prudent disputant who has to deal with such a sophist will not suffer the artifice to succeed, for he will gather and keep together the probabilities, maintaining throughout a bond of union that cannot be severed.

Skillful sophists, with more success than one might imagine, so repeat arguments as to make what is, in fact, a single argument seem many. The success of this artifice is owing to the adroitness with which the disputant changes the form of his argument without changing its substance. The forms are rapidly changed, and each quickly passed before the jury, not allowing the jurymen time to discover that there is only one argument.[99] The artifice is not successful where the disputant against whom it is directed has keenness enough to detect the imposition, and power enough to make the jury see that what is in appearance many arguments is, in fact, one only. This artifice is often employed by those who object to a proposition. By varying the form of the objection they seem to gather numerical strength where there is, in reality, no addition either in numbers or intrinsic force.

"A disputant," says Dr. Watts, "when he finds that his adversary is too hard for him, with slyness turns the discourse." Shifting ground is a device that has given comfort, and sometimes safety, to many a far-spent disputant. A sly and an adroit transition from one point to a resembling but different point very often deceives. It is sometimes a very effective mode of escaping from uncomfortably close quarters. In a forensic discussion

of Horr for the murder of Church is an admirable specimen of skill in binding and holding together the circumstances and probabilities of a complex case. Ram on Facts (Townshend's ed.), 236n.

[99] The artifice is not unlike the trick which Sir George Beaumont and his roystering companions played upon the innkeeper, when they, leaving the coach on one side, re-entered it at the other, and made it seem to the bewildered "Boniface" that the coach contained a great number of passengers. As darkness aided those wags, so does confusion aid the sophist.

there is not so much room for shifting as in some other discussions, but there is enough to make it important to keep a close watch upon adverse counsel, and see that he does not evade the real point by slyly substituting a resembling one, and arguing that as if it were the point originally in dispute, and the real point in issue.

Evasions assume many forms. A common mode of evading the real question is to assume that wrong has been perpetrated, or a crime committed, and to vehemently denounce the wrong or the crime. Thus, it is assumed, upon insufficient evidence, that slanderous words have been spoken, and the injury resulting from slanderous words is dwelt upon and greatly magnified. "Another element," says Aristotle, "is the doing away or establishing a point by exaggeration, and this occurs when, without having shown that the prisoner has really committed the crime, the accuser proceeds to exaggerate it; for this fallacy causes it to appear, when the accused employs the exaggeration, that he has not done the deed; or, supposing it to be the accuser who gets into a passion, that the accused has done the deed."[1] In cases of bastardy, seduction, criminal conversation, and the like, this artifice is often successful; and it is one to be feared in every case where there is reason, even if it be a slender one, warranting an appeal to the passions of the jury. The advocate who succeeds in awakening sympathy or arousing indignation does very much toward concealing and evading the real point in issue. A skillful sophist very often directs attention from the failure or insufficiency of proof by keeping the attention of the jury fastened upon the consequences of the wrong which he attributes, by a sly and groundless assumption, to the party against whom he pleads.

It is not uncommon for cunning advocates to direct their main attack upon some particular witness or witnesses, and to assume that the whole case rests upon the testimony of the witness or witnesses thus assailed, ignoring entirely all other testimony. In cases where a witness has been impeached by proof of state-

[1] Aristotle's Rhetoric, Book II, Chap. XXIV.

ments made out of court, advocates often assume that what the impeaching witness says is evidence of the facts to which his testimony relates; whereas, the testimony of an impeaching witness does not prove the fact in any sense, for all that it does, and all that it can do, is to discredit the witness against whom it is adduced.

In many instances the force of evidence is evaded by a stormy attack upon the character of a party, leaving entirely out of consideration the fact that even a bad man may have a good case well proved. Sometimes the attack is made solely upon the opposing counsel, and in some instances the sophist gains his point, for he leads the counsel assailed to defend himself at the expense of his client's cause. By an amusing anecdote, a keen jest, or a bright story, the sophist very often succeeds in drawing attention from the weakness of his own case and the strength of his adversary's; and he who finds his opponent employing an anecdote, a jest, or a story, may, in most instances, safely presume that it is a device to divert attention from the point in dispute. An unpleasant point is often approached in an indirect way, the progress being made by the aid of amusing anecdotes, or by some pleasant but irrelevant remarks. A point of cunning is, as Bacon says, "When you have anything to obtain of present despatch, you amuse and entertain the party with whom you deal with some other discourse, that he be not too much awake to make objections."[2]

It is scarcely necessary to suggest that the remedy for the artifice of evasion is that of stating the point in dispute, and compelling the jury to keep it in sight. The jury should not be simply reminded of the point disputed; they should be made to understand what it is, how it arises and by what evidence it is supported. A warning that the object of the adverse counsel is to evade is well enough, but there should be something more than a mere warning; the evasion should be exhibited so that it can be perceived. What is needed most is not a mere caution, but proof of the fact that there is an attempt to escape a discussion of the point on which the dispute hinges.

[2] Bacon's Essays, Essay XXII, "Of Cunning."

Where the attack is upon particular witnesses, and there are other witnesses to the same point, the force of the attack may be broken by showing that there are other witnesses, and that the attempt to confine attention to those assailed is a mere artifice to avoid testimony that cannot be successfully met. Where the testimony of an impeaching witness is relied upon as proving the fact involved in it, the course is plain: Show that it is not evidence of the fact, and that its only force is to weaken the testimony of the witness sought to be impeached.

An artifice sometimes resorted to, with more success than one would suppose who had not observed its effect upon jurors, is that of unduly lauding opposing counsel. This is sometimes so cleverly done as to make the jurors distrust everything that is said by the counsel upon whom the praise is bestowed. The cunning sophist does all he can to make it seem that whatever strength there appears to be in the case of the adverse party is owing to the skill and ability of his counsel. "We commonly find," says Archbishop Whately, "a barrister—especially when he has a weak cause—complimenting his learned brother on the skill with which he has pleaded."[3] This artifice is nullified, in general, by referring to it as a stale trick, and by fairly, and with frankness, presenting arguments to the jury, avoiding all attempts at mere oratorical display. A quiet, sober style, and a smooth and easy manner, is, by far, the best mode of procedure.[4]

An effective artifice is that of stringing together some propositions that are indisputably true, and covertly assuming that others, mingled with them, but not distinctly asserted, are also true. By this means truth and falsehood are blended, and by an adroit process all the mass is made to seem to be true. It is said by Aristotle that "The stringing together the heads of many syllogisms is a good expedient with a view to expressing yourself

[3] Note to Bacon's Essay "Of Cunning."

[4] Webster's answer to the counsel for the defense, in his great argument against the murderers of Captain White, is an excellent example of the method of dealing with this artifice. See Whipple's Recollections of Eminent Men, 34, 35, for a description of the plain, straightforward manner in which Webster usually answered Rufus Choate.

with all the air of a syllogism in your style; thus, 'that he preserved some, avenged others, emancipated others, emancipated the Greek people;' for each of these propositions has been demonstrated from others, and when they are put in conjunction it appears that something ever results from them."[5] By gathering many truths together the impression is created that some important thing results from them which is also true; and a careless reasoner is misled, in some instances, by not ascertaining whether the conclusion is, or is not, relevant; in others, by not ascertaining whether there is any connection between the propositions stated; and in still others, by a failure to ascertain whether the conclusion follows from the propositions stated. In the greater number of cases, however, the deception results from so adroitly mingling the true and the false that all seems to be true. This artifice is often made very effective by stating true propositions, enlarging upon them, insinuating that a given conclusion results, and then, as if diverted by some other topic, suddenly leaving the argument without directly stating the conclusion, but still so artfully insinuating it as to make it seem to follow. The purpose of the sophist who pursues this course is to create the impression that if his attention had not been diverted he would have firmly established his conclusion, and to defeat this purpose it is only necessary to uncover his design and expose the fault in his argument by stating in express terms the insinuated conclusion, and showing that it does not result from the propositions asserted.

Mysteriously hinting a conclusion without directly expressing it, is an artifice not uncommon in forensic discussion. To give a thing an air of mystery is to excite men's curiosity; and, in almost every instance, a hint slyly dropped creates the impression that some very bad thing lies back of what is expressed. Bacon wisely observes that "There is nothing makes a man suspect much, more than to know little, and, therefore, men should remedy suspicion by procuring to know more."[6] Frequent use of this artifice is made by offering evidence which the unscrupulous

[5] Aristotle's Rhetoric, Book II, Chap. XXIV.
[6] Essay XXXI, "Of Suspicion."

advocate knows will be rejected, and darkly hinting that if evidence on that point could be heard, very bad or very important things could be proved. This artifice works a deal of mischief, if adroitly employed and without check, for jurors are quick to assume that what is kept from them is much more important than it really is, and that it is kept from them because the party who objects dares not allow it to be given them. Where counsel attempt to practice this artifice, it is well enough to resolutely object, and ask the prompt and decisive interference of the court. It is sometimes expedient to ask the court to instruct the jury that it is their sworn duty to act upon the evidence submitted to them, and that the law puts upon the court the exclusive duty and responsibility of determining what evidence is or is not competent. A caution should, perhaps, be added. and that is, never to magnify a trivial thing into importance by too earnestly combating it.

Very similar to the artifice just mentioned is that of hinting something very wicked, and, after insinuating a shadowy idea of its character, turning from it quite suddenly, as if it were an unpleasant topic. A form of this artifice consists in saying something good of a party or a witness and then hinting at something very bad, so bad that it is not a subject fit to be mentioned. The expert sophist often manages to have his sinister hint spring up as if it came by the way, and entirely unpremeditated, and to effect this, he often proceeds as if unmindful of it, and then comes back to it with a swift, delicate touch, as if it were something he had almost forgotten.

Insinuation is a favorite weapon of the cunning sophist. He prefers insidious assaults to open attacks. He employs various means to convey a bad impression of a party or a witness, without making a direct charge. Bacon thus describes one of them: "Some have in readiness so many tales and stories, as there is nothing they would insinuate but they can wrap it into a tale, which serveth both to keep themselves more in guard, and to make others carry it with more pleasure."[7] Sometimes these in-

[7] Bacon's Essays, Essay XXVI, "Of Cunning."

sinuations are aided by assumptions, covertly made, as, for instance, "You, gentlemen, have observed in the conduct of the witness evidence of his corrupt design; and I could, if the court had permitted it, have shown you his flagrant dishonesty." In other cases it is hinted that some person is the power behind the witness, and that respect for his relatives and friends constrains the speaker to withhold his name.

A case may be rescued from harm by dispelling all mystery, and making everything open and plain. To accomplish this, it is necessary to express clearly, and always very fully, the insinuations, and show that they are utterly groundless. If the artifice can be clearly exposed, the exposure will do the counsel who employed it very much mischief, for the jury will be so angered by his attempt to impose upon them that they will be almost sure to deny him the credit for the truth his argument really contains.

Not very different from the artifices we have been speaking of is that employed by counsel who know that the court will instruct against them upon the law, and whose object is to influence the jurymen to disregard the instructions given them by the court. The course often pursued in such cases is for the advocate to state, with an air of great frankness and deference, what he supposes to be the law, to enlarge upon the wisdom and justice of his rule, to point out the evil consequences that will result from any other, and finally to suggest, delicately and indirectly, that, while it may be true that the jury are bound to take the law from the court, still, as it is an unjust rule, they should not extend it, but rigidly limit it to cases to which it directly applies.[8] The advocate who deals with this artifice will, if he knows his duty, remind the jurymen that they are bound to take the law from the court, and that they will be guilty of perjury if they disregard their oaths.

Supposed cases are often used with great effect. A case somewhat resembling the one on trial is imagined, and the jury are

[8] This artifice need not, of course, be resorted to in criminal cases, in jurisdictions where the jury are the exclusive judges of the law as well as of the facts.

invited to take the supposed case as the real one. Of course, if there is an essential resemblance there is no artifice. The sophist, however, does not select a case essentially resembling the one on trial, but contents himself with one that he adroitly makes appear to resemble it in all its essential features. This method very often veils an attack upon a party or a witness. It is made the vehicle of denunciation, for the advocate who employs it, while ostensibly attacking an imaginary person, is really assailing a real one. This real purpose he does not avow, but so insinuates it that the jury are made to see what he really means his attack to accomplish.

Very much like this last artifice is that of mentioning persons or things indirectly while disavowing any purpose to allude to them. Grattan's invective against Flood is a striking example of the adroit and effective employment of this artifice. Junius supplies some very striking examples of its power and efficacy. Curran, in many of his jury speeches, employed it with great power, notably in his speech in defense of Finnerty. While avowing that he was not speaking of informers, he described them more powerfully and effectively than it was possible for him, or for any one, to do in a direct description. A speaker often names topics with a declaration that he passes over them when, in fact, he fully places them before the jury.[9]

[9] It may not be out of place in this connection to refer to a case in which the elder of the authors represented the railway company in an action against it for the destruction of an elevator by fire from sparks emitted by a passing locomotive, at a time when the old narrative form of special verdict was authorized when requested, as it had been by the defendant. The theory of the plaintiff was that the spark arrester on defendant's locomotive was defective, but the defendant introduced many witnesses to show that it was the best known in use and was in perfect order. It was apparent, however, that the jury were determined to find against the defendant. We quote from a paper read by Judge Rabb, the trial judge, at the meeting of the Indiana Bar Association in 1906, as to the course pursued by defendant's counsel, and its success: "In argument the defendant's counsel spent all their force and fury in a pretended effort to convince the jury that the evidence proved that the plaintiff had fired the elevator himself, or had some one else to do so to obtain the insurance on it, and they thus drew the attention of the jury and opposing

The sophist, who knows his weapons and how to wield them, does not employ his artifices in such a manner as to challenge the jurors to dispute with him. For the matter of that, as we have more than once asserted, the wise advocate does not state his arguments, although satisfied of their soundness, in such a way as to provoke opposition; but this suggestion, important as it is, is not directly relevant to the point under immediate discussion. Returning to that point, we say that the cunning sophist is very careful to mildly and gently insinuate his argument. "Soft in words and modest in speech," he deferentially puts his propositions before the jury. Aristotle, himself a crafty disputant, gives this advice: "Besides, we must not be in earnest, although the thing be altogether useful, for men make greater opposition against persons in earnest."[10] What Aristotle means is that the disputant must not be dogmatic, but should insinuate his propositions in a gentle manner rather than so state them as to invite opposition. Locke wisely says: "An ill argument introduced with deference will procure more credit than the profoundest science with a rough, insolent and noisy manner."[11]

Knavish tricks, born of downright villainy, are attributed to lawyers by many writers. Thus, it is said that the counsel for

counsel to this one issue, and induced the jury to believe that all it was necessary for them to do to fix liability on the company was to find that sparks emitted from the engine did actually fire the elevator, whatever might be the condition of the spark arrester, and this the jury did in no uncertain terms and allowed the plaintiff the highest possible sum under the evidence as damages, but they also found that the spark arrester on the locomotive was of the latest approved pattern and in good repair. And when they learned that this finding was fatal to the plaintiff's case, their chagrin and disappointment was amusing to see. Some of them came to me and complained that they had been tricked into finding in favor of the railroad whereas they desired and intended to find in favor of the plaintiff. * * * This jury would have made any sort of finding whether supported by the evidence or not, in order to stick the defendant, against whom they thought they had no kind of prejudice whatever."

[10] Organon, Book VIII.

[11] If any reader is desirous of knowing how easy it is to construct ingenious artifices, he will do well to read Pascal's letters, especially letter No. VI.

one accused of counterfeiting pocketed the forged bank note in the confusion of the trial, and substituted for it a genuine note, and thus secured the acquittal of his client. Southey tells a story of a barrister who secured the acquittal of a man accused of robbery by having an almanac printed which falsely gave the changes of the moon.[12] A trick of a very similar nature is, by a biographer who evidently has not a very high or just appreciation of an honest man's character, attributed to Abraham Lincoln.[13] But these stories are, it may be safely said, without foundation. They are, in their essential features, at least, much older than Southey or Lincoln. But we need not spend time in dealing with such idle stories, for, although we are compelled to own that there are knavish lawyers who need watching, we affirm that they attempt few such bold tricks, because they know that the court and opposing counsel are not to be imposed upon by such transparent rascality.

There are practices resorted to for obtaining the favor of the jury that closely resemble artifices, but which cannot be justly ranked with them. These practices, we think, may be justly denominated the tactics of forensic oratory. A favorite practice with some advocates is to praise the jury, hoping by this means to obtain favor from them. In general, the practice is more productive of harm than good. Mr. Harris says: "Nothing makes a jury more keenly sensitive of your contempt for their mental capacity than flattering them. When I say flattering, I mean the coarse and fulsome style exhibited in such expressions as 'an intellectual jury,' 'a jury of Englishmen,' and kindred phrases; feeble phrases which tend only to prove that 'nature abhors a vacuum.' There is a flattery that is soothing and winning; but to flatter well is an art and a gift which very few possess. It consists in the employment of language which does not itself directly flatter, but induces the hearers to flatter themselves. It is

[12] The Doctor, Vol. III, p. 146.

[13] Lamon's Life of Lincoln, 327. This biographer, we cannot avoid saying, does an honest man a very great injustice. See also, however, the Autobiography of General Ben Butler.

subtle and imperceptible as it is delightful and irresistible."[14] There are occasions when praise is acceptable to jurors, and induces them to listen with favor to the advocate who bestows it; but these occasions are rare. "There be," says Bacon, "so many points of praise, that a man may justly hold it in respect."[15] Jurors do often hold praise "in suspect," and regard with disfavor one who untimely or awkwardly bestows it upon them. But there is a praise that, deftly and timely given, is very grateful to jurors, and "openeth their ears to the words that are spoken." Erskine, in behalf of Stockdale gave the jury words of praise that we may be sure found a ready and welcome access to their hearts. Mackintosh, in his great speech in defense of Jean Peltier, supplies a fine specimen of praise, adroitly and justly bestowed.

Consultation with the jurors is an effective aid to conviction. In talking to the jurymen as if he were one of them, the advocate disarms hostility to his arguments, opens a way for their reception, and is taken into the confidence of the jurors. We have referred to the course pursued by Abinger and other great advocates, and it is unnecessary to repeat what we have said; it is enough to direct attention to the importance of becoming one of the jury by consulting with them. The advocate who has the faculty of consulting with his jurors will obtain verdicts even if he be a slow and unattractive speaker. And there are many "artifices of manner" often employed by advocates with more or less success.[16]

It is often prudent to open the discussion of a proposition as if there were objections to it worthy of candid consideration. By fairly stating and refuting these objections a sure place is obtained for the counsel's proposition in the minds of the jurors. A subdued and deliberate talk with the jurors is the true course in cases where this method is adopted. A calm and scrupulously

[14] Hints on Advocacy, Chap. I. "Many men know how to flatter, few men know how to praise," said Wendell Phillips, referring to an old Greek saying.

[15] Bacon's Essays, Essay LIII, "Of Praise."

[16] See 38 Alb. Law Jour., 226, where examples and illustrations are given.

fair statement of the objections, and a just refutation of them, insures conviction. Neither artifice nor pretense need enter into the conduct of counsel, unless candor can be accounted, as it sometimes is, an artifice. Where the advocate is quite sure that objections will be urged, it is, in general, better to meet them openly and fairly, and to refute them if possible. It is better to anticipate and answer arguments than to conceal or misrepresent them.

"The ordinary employment of artifice," says LaRochefoucauld, "is the mark of a petty mind, and it almost always happens that he who uses it to cover himself in one place, uncovers himself in another." This is generally true of the artful advocate, who relies on cunning,[17] for he is seldom able to protect himself at all points. A fair, candid, and straightforward advocate scores by far the most victories.

[17] If we must employ cunning, let it be as Greville advises: "We should," he says, "do by our cunning as we do by our courage—ever have it ready to defend ourselves, never to offend others."

CHAPTER XIII.

INSTRUCTING THE JURY.

"Courts, being composed of those who, from many years' study and practice of the law, are therefore supposed to be intimately acquainted with it, have assigned to them, as their peculiar province, to determine what the law is in relation to all cases coming before them; and to instruct juries therein so far as may be requisite to enable the latter to carry the law faithfully into effect in the discharge of their duties."—*Judge Kennedy.*

Practical Suggestions.

In civil cases all questions of law are decided by the court, and all questions of fact by the jury. In criminal cases, even where it is held that the jury are the exclusive judges of the law and the facts, the prevailing rule is that it is, nevertheless, the duty of the court to state the law to the jury. There is, it is manifest, an inconsistency in the rule which prevails in criminal cases, for, if the jury are the exclusive judges of the law, as well as of the facts, it seems little else than an idle ceremony for the court to instruct them as to the law. The inconsistency is supposed to be dissipated by ruling that the instructions are advisory merely, and not obligatory, but this by no means removes the inconsistency. It is true, however, that instructions delivered by a judge of learning and probity will, in most cases, exert a great influence over the minds of jurors, so that it is of no slight importance to secure a favorable charge in criminal cases.

In many jurisdictions, it is not true in practice that the jury are the exclusive judges of the facts in civil cases, although in theory it is everywhere asserted. It is not true where the English rule prevails. Mr. Chitty thus describes the practice of the British courts: "It is the practice for the judge at *nisi prius* not only to state to the jury all the evidence that has been given, but to comment upon its bearing and weight, and to state

the legal rules upon the subject, and their application to the particular case, and to advise them as regards the verdict they should give." A judge who undertakes to comment upon the bearing and weight of evidence cannot avoid some expression of opinion upon the facts, and he does influence the jury, even though he may declare that they are the exclusive judges of the facts. The American courts, as a general rule, do not follow the English practice, but charge exclusively upon questions of law, leaving the facts entirely to the jury. This is the only practice which can be pursued without overturning the theory that the jury are the exclusive judges of the facts, and it is the practice which enables parties to get their exceptions to instructions fully and clearly in the record.

Where the English practice prevails, it is not possible to reduce to writing all the instructions which a party desires the court to give the jury; and the utmost that can be done in such cases, unless the facts are few and not intricate, is to put in writing specific propositions of law which the party desires shall be stated to the jury as part of the charge of the court. Where the court instructs the jury only upon matters of law, then all of the instructions should be put in writing, and placed before the court in due time to insure their consideration.

The true rule is for the advocate, in every case, to prepare and submit to the court written instructions. This is the safe rule, and is "honored in the observance," no matter how learned and careful the presiding judge may be. It is one thing to know the principles of the law, and another to call them forth and apply them to the particular case when occasion demands. This is the work of the advocate. It is for him to bring into view the governing principles, and to array them so that they will fit the facts developed by the evidence. He, it is presumed, has studied the particular case, and has ascertained the principles by which it is ruled. If the presumption does not hold good, the advocate's duty has not been faithfully performed. If the presumption is valid, as it ought to be, then the case has been to him one of especial interest and study, arousing and quickening all his faculties, so that no point has been overlooked, and no principle suf-

fered to pass unnoticed. Like the specialist, who studies one thing, the advocate is better prepared on the particular case than even the most learned judge who has given the case no especial study. No judge has reason to take offense because written instructions covering all points are submitted to him, for in submitting them the advocate does not impugn the judge's learning or ability, but, in theory, at least, however it may be in reality, he simply refreshes the memory or excites the attention of the judge. But here, as elsewhere, a plain duty must never be left undone for fear of giving offense. A just judge never sees an affront in a courteous performance of duty.

Instructions should be written, as far as possible, when there is time for deliberate thought, and not during the turmoil and excitement of the trial. They cannot be dashed off at white heat, like the words of an address to the court or jury, for each word should be carefully weighed before finding its place in an instruction. The judge may alter and amend instructions if he chooses to do so, but he is not under any obligation to undertake the task, for if the instructions are not in terms correct, the court commits no error in refusing them.[1] But the advocate should not be so much influenced by the fear that his instructions may not successfully pass the scrutiny of the court as by a just pride in his work and in his profession.

There is another reason why the work of preparing instructions should be done with skill and care, and that reason is this: A proposition of law, strongly, clearly and tersely stated, goes with force into the minds of the jurors, and there will abide, while a rambling, feeble and diffuse statement neither arouses attention nor produces conviction. Words, well chosen and well arranged, are powerful in many places, and in few places are they of more force than in an instruction. Jurors are quick to seize upon strong statements, but slow to apprehend loose and prolix propositions. If a proposition of law is clearly stated in a few well-chosen words, each pregnant with meaning, it will not pass unheeded even if it does not carry conviction.

In writing instructions, the counsel assumes the functions of

[1] Goodwin v. State, 96 Ind. 550; post Rule 12.

the court, and must, for the time, sink the office of the advocate in that of the judge. What he puts into his instructions he puts there for the court, and as its organ. Zealous and hot in argument he may be, but cold and impartial he must be in writing his instructions. No partisan zeal must betray him, or else no instruction he prepares will receive the sanction of the judge. Better do this work, as Von Moltke is said to have done his in preparing the plans of the campaigns against the French, before the contest actually begins. A hastily drawn instruction may be so inaccurately worded as to find no favor with the judge; or, if it is accepted, it may be the cause of a new trial or of a reversal.

It is by no means a light or easy task to prepare an instruction. Definition is always difficult; it is so even in simple matters, and in complex and tangled questions of law and fact it is a task that often taxes the mental powers of strong men to the utmost. Two great virtues in a series of instructions are, perspicuity of arrangement and clearness of definition. Logicians have, again and again, asserted the value of distribution and definition. One of the old writers said: "Such is the excellency of distribution and definition that they do almost suffice for the putting down of any art; therefore, Socrates, in *Phædro Platonis,* saith, that if he can find any man who can cunningly divide, he will follow his steps, and admire him for a god." Where propositions must be briefly stated, and with great accuracy, as in instructions to the jury, definition is of the highest importance, since each instruction asserting a proposition of law must, in a sense, at least, define it; and what adds to the difficulty of the work is that the definition must be in the concrete and not in the abstract. This is so, because it is not enough to state mere abstract rules of law, but the rules stated must be applied to the facts.

It is seldom safe to copy from a judicial opinion. Thoughts may generally be borrowed with safety, but not words. Judicial opinions are written for a purpose very different from that for which instructions are designed. Language not out of place in an opinion is very often out of place in an instruction. Principles are to be extracted from the decided cases, but not the words in which they are expressed. Words are but the clothing, and

misfits commonly result from borrowing clothing. Cases, although members of one general class, are seldom so closely alike that what is said in one can be accurately said in all. But leaving out of account these considerations, there is still reason for censuring the practice of copying instructions, and that reason is, if the advocate, after a study of the authorities, thinks out his own instructions and gives them expression in his own words he secures a mastery of his case that gives a strength and confidence that will do much to secure success. If he contents himself with servilely copying the words of another, his hold upon his case will be feeble and his way insecure. The work of thinking out the instructions is valuable as a preparatory training for the actual contest; but the work of copying will do comparatively little good in the way of mental discipline.

It is sometimes difficult to prepare instructions that will not invade the province of the jury by assuming facts, or the like. But this danger may generally be avoided by stating them in a conditional form.[2] Care should also be taken, where an instruction is in the nature of a mandatory instruction, to embody every essential fact or matter.

[2] We give a brief instruction of a somewhat general nature that might be proper in an action for damages for personal injuries caused by the negligence of the defendant: "If you believe from the evidence that the defendant was negligent as alleged in the complaint, that such negligence, if any, was the proximate cause of the injury complained of, and that the plaintiff was free from contributory negligence, your verdict should be for the plaintiff." Here invasion of the province of the jury is avoided by the use of the conditional form and the phrase "if any."

RULES OF LAW.

1. As a general rule, whatever is said by the court to the jury upon the questions of law or of fact involved in the case may properly be considered as a part of the charge.

Hasbrouk v. City of Milwaukee, 21 Wis. 217. But mere general observations of the court upon other subjects, such as the length of the trial, the form in which the verdict should be expressed, or other collateral matters, are not generally treated as instructions. Stanley

v. Sutherland, 54 Ind. 339; Prater v. Snead, 12 Kan. 447; City of Atchison v. Jansen 21 Kan. 560. See, also, Milne v. Walker, 59 Iowa 186, 13 N. W. 101; Bradway v. Waddell, 95 Ind. 170; Pilsbury v. Sweet, 180 Me. 392, 14 Atl. 742; Hinckley v. Horazdowski, 133 Ill. 359, 24 N. E. 421, 8 L. R. A. 490.

2. It is discretionary with the court, in the absence of any statutory regulation, to instruct the jury of its own motion;[1] and the instructions, in such case, need not be reduced to writing, except so far as may be necessary to enable counsel to except.[2]

[1] Proffatt's Jury Tr., § 311; Pennock v. Dialogue, 2 Pet. (U. S.) 1-15, 7 L. ed. 327; Swope v. Schafer, 9 Ky. L. 160, 4 S. W. 300; Clark v. Hammerle, 27 Mo. 55-70; Strohn v. Detroit &c. R. Co., 99 Am. Dec. 114, 119, note. See also, 2 Thomp. Tr., §§ 2338-2341.

[2] Smith v. Crichton, 33 Md. 103-108. And see McJunkins v. State, 10 Ind. 140.

3. Under the statutes of most of the states, written instructions may be demanded as matter of right.

Proffatt's Jury Tr., § 349; Bradway v. Waddell, 95 Ind. 170, and authorities cited. See also, note to Strohn v. Detroit &c. R. Co., 99 Am. Dec. 120. Such state statutes do not govern in the federal courts. Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; United States v. Train, 12 Fed. 852.

4. Where special instructions in writing are requested, the request should be made in time for the court to give the subject due consideration;[1] and the court has power to require that the instructions asked be presented before the final arguments are made to the jury.[2]

[1] McJunkins v. State, 10 Ind. 140; Newman v. Greeb, 101 N. Y. 663, 5 N. E. 335; State v. Rowe, 98 N. Car. 629, 4 S. E. 506.

[2] Manhattan Life Ins. Co. v. Francisco, 17 Wall. (U. S.) 672-678, 21 L. ed. 698; Ela v. Cockshott, 119 Mass. 416-418; Thompson on Charging Jury, § 98. See also, Evansville &c. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450.

But where the statute fixes the time for presenting such instructions and request, the court cannot change it. Lazelle v. Wells, 17 Ind. 33.

State statutes on this subject do not govern in the United States courts. Indianapolis & St. L. R. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898.

5. Although the trial court may be required by statute to charge or instruct the jury generally, yet, if specific instructions are desired, they should be duly prepared and presented to the court with a request that they be given.

Sanger v. Craddock, (Tex.), 2 S. W. 196; Robinson v. Levi, 81 Ala. 134, 1 So. 554; Du Souchet v. Dutcher, 113 Ind. 249, 15 N. E. 459; note to Strohn v. Detroit &c. R. Co. 99 Am. Dec. 114, 118.

6. Where instructions are required to be in writing, modifications of those asked and given must also be in writing.

Lung v. Deal, 16 Ind. 349; Patterson v. Indianapolis &c. Co., 56 Ind. 20. See also, Hopt v. People, 104 U. S. 631, 26 L. ed. 873; Sackett's Instr. to Juries, § 1.

7. Instructions should be pertinent to the issues and to the evidence.

Miles v. Douglas, 34 Conn. 393; People v. Muller, 96 N. Y. 408, 413; Humphreys v. Borough of Woodstown, 48 N. J. L. 588, 7 Atl. 301; Proffat's Jury Tr., §§ 313, 314. See also, Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. 84; Ohio &c. R. Co. v. Webb, 142 Ill. 404, 32 N. E. 527; Lindley v. Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361.

Under this rule it is not error to refuse irrelevant instructions upon mere abstract propositions of law, even though they state the law correctly. Jellison v. Goodwin, 43 Me. 287, 69 Am. Dec. 63; Stovey v. Brennan, 15 N. Y. 524; Thorwegan v. King, 111 U. S. 549, 28 L. ed. 514; City of Abilene v. Hendricks, 36 Kan. 196, 13 Pac. 121; Augusta & S. R. Co. v. Randall, 79 Ga. 304, 4 S. E. 674; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593.

But where a court gives such an instruction it will not be error sufficient to reverse the cause, unless it may have tended to injure the complaining party. Taylor v. Morrison, 26 Ala. 728, 62 Am. Dec. 747; Stockton v. Stockton, 73 Ind. 510.

So, it is erroneous to submit to the jury by instruction a fact or state of facts which there is no evidence tending to prove. Harrison v. Cachelin, 27 Mo. 26; Swank, v. Nichols, 24 Ind. 199; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Hutchins v. Hutchins, 98 N. Y. 56; Jonas v. Field, 83 Ala. 445, 3 So. 893; Missouri Pac. R. Co. v. Platzer, 73 Tex. 117, 11 S. W. 160, 3 L. R. A. 639. See also,

Jackson v. Williams, 92 Ark. 486, 123 S. W. 751, 25 L. R. A. (N. S.) 840.

8. Where there is any evidence fairly tending to support a party's theory of the case, he is entitled to an hypothetical instruction based thereon.

Chamberlin v. Chamberlin, 116 Ill. 480, 6 N. E. 444; State v. Dunlop, 65 N. Car. 288; Carpenter v. State, 43 Ind. 371; People v. Taylor, 36 Cal. 255; Blake v. Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

But care should be taken not to violate rule 7, *supra*, in giving such instructions. State v. Harrison, 5 Jones (N. Car.) 115; Breese v. State, 12 Ohio St. 146; First Nat. Bank v. Hurford, 29 Iowa 579; Jeffersonville R. R. Co. v. Swift, 26 Ind. 459.

9. Facts in controversy, on which the evidence is conflicting, must not be assumed.

Moore v. Watts (Ala.) 2 So. 278; Nollen v. Wisner, 11 Iowa 190; Proffatt's Jury Tr., §§ 316-318; Pratt v. Ogden, 34 N. Y. 20-22; Huffman v. Cauble, 86 Ind. 591; McMillan v. Baxley, 112 N. Car. 578, 16 S. E. 845; Galligher v. Connell, 35 Neb. 517, 53 N. W. 383.

10. The court should not express any opinion on the weight of evidence,[1] nor on the credibility of particular witnesses.[2]

[1] People v. Welch, 49 Cal. 174-181; Fulwider v. Ingels, 87 Ind. 414; Long v. State, 23 Neb. 33, 36 N. W. 310; State v. Huffman, 16 Ore. 15, 16 Pac. 640; Proffatt's Jury Tr., §§ 321, 322; 2 Elliott's Gen. Pr., § 901. But in the United States courts and some of the state courts the rule is otherwise. See note to State v. Whit, 72 Am. Dec. 541, 542; 2 Elliott's Gen. Pr., §§ 892, 901.

[2] Crutchfield v. Richmond &c. R. Co., 76 N. Car. 320; Commonwealth v. Barry, 9 Allen (Mass.) 276; Finch v. Bergius, 89 Ind. 360; Chambers v. People, 105 Ill. 409; Kerr v. Lunsford, 31 W. Va. 660, 8 S. E. 493, 2 L. R. A. 668; Williams v. Dickenson, 28 Fla. 90, 9 So. 847.

11. Undue prominence should not be given to particular portions of the evidence.

Sawyer v. Hannibal &c. R. Co., 37 Mo. 240, 263; McAdory v. State, 62 Ala. 154; Gross v. Shaffer, 29 Kan. 442; State v. Tawney, 81

Kan. 162, 105 Pac. 218, 135 Am. St. 355; Proffatt's Jury Tr., §§ 319, 320; Chesney v. Meadows, 90 Ill. 430; Wood v. Deutchman, 75 Ind. 148; Odeneal v. Henry, 70 Miss. 172, 12 So. 154; Morgan v. State, 48 Ohio St. 371, 27 N. E. 710.

12. It is not error to refuse an instruction unless it is proper in the very terms in which it is prayed.

Goodwin v. State, 96 Ind. 550; Proffatt's Jury Tr., §§ 338-440; Head v. Bridges, 67 Ga. 227; Tower v. Haslane, 84 Me. 86, 24 Atl. 587; Davis v. Getshell, 32 Neb. 792, 49 N. W. 776.

13. Where an instruction is ambiguous, and likely to mislead the jury, it may be refused.

Farrish v. State, 63 Ala. 164; Baxter v. People, 3 Gilm. (Ill.) 368; Loeb v. Weiss, 64 Ind. 286. See also Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. 84; Leroy v. Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Irvin v. Missouri &c. R. Co. 81 Kan. 649, 106 Pac. 1063, 26 L. R. A. (N. S.) 739.

14. An instruction may be refused where other instructions covering the same matter have already been given.

Territory v. Baker (N. Mex.), 13 Pac. 30; Thompson v. Duff, 119 Ill. 226, 10 N. E. 399; Atkinson v. Dailey, 107 Ind. 117, 7 N. E. 902; Bronnenburg v. Coburn, 110 Ind. 169, 11 N. E. 29; Indianapolis &c. R. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; People v. King, 27 Cal. 507, 87 Am. Dec. 95; Northwestern Mut. Life Ins. Co. v. Muskegon Bank, 122 U. S. 501, 30 L. ed. 1100, 7 Sup. Ct. 1221, 25 Cent. L. J. 300; Southern Pac. R. Co. v. Hogan (Ariz.), 108 Pac. 240, 29 L. R. A. (N. S.) 813.

15. The instructions of the court should be construed together as an entirety, and a mere sentence that might seem incorrect if taken by itself will not render the instructions erroneous when properly explained by the context, so that, as a whole, the law applicable to the case is correctly stated.

People v. McCallam, 103 N. Y. 587; Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822; Howe v. Hyde, 88 Mich. 91, 50 N. W. 102; Chicago &c. R. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; State v. Miller, 111 Mo. 542, 20

S. W. 243; Hodges v. State, 22 Tex. App. 415, 3 S. W. 740, 9 Crim. L. Mag., 603; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Shields v. State, 149 Ind. 395, 49 N. E. 351, and authorities therein cited.

16. Where the jury are unable to agree, they may sometimes be recalled for further instructions; but such instructions should not, ordinarily, at least, be given except in open court, in the presence of the parties or their counsel.

O'Connor v. Guthrie, 11 Iowa 80; Redman v. Gulnac, 5 Cal. 148; Campbell v. Beckett, 8 Ohio St. 210; Thomp. & M. on Juries, § 355; Davis v. Fish, 1 C. Gr. (Iowa) 406, 48 Am. Dec. 387.

But it has been held that in contemplation of law the parties remain in court until a verdict is returned, or the jury discharged, and that it is, therefore, sufficient if the instructions are given in open court, whether the parties or counsel are actually present or not. Cooper v. Morris, 48 N. J. L. 607, 7 Atl. 427. And see, Chapman v. Chicago &c. R. Co., 26 Wis. 295, 7 Am. 81; Taylor v. Betsford, 13 Johns. (N. Y.) 487; Preston v. Bowers, 13 Ohio St. 1, 82 Am. Dec. 430; Sage v. Evansville &c. R. Co., 134 Ind. 100, 33 N. E. 771.

17. An exception to the instructions, or refusal to instruct, must be taken at the time, or at least before the jury have rendered their verdict.

Roberts v. Higgins, 5 Ind. 542; Phelps v. Mayer, 15 How. (U. S.) 160, 14 L. ed. 643; Vaughn v. Ferrall, 57 Ind. 182; Thomp. on Charging Jury, § 115; Spooner v. Handley, 151 Mass. 313, 23 N. E. 840. Such, at least, is the rule in most jurisdictions, but it may depend upon the statute of the particular jurisdiction. 2 Elliott's Gen. Pr., § 907, n. 1.

18. The exception should be specific, for if the entire charge be excepted to, and any portion thereof be correct, the exception will be unavailing.

Jones v. Osgood, 6 N. Y. 233; Beaver v. Taylor, 93 U. S. 46, 23 L. ed. 797; Bogt v. Gassert, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Elliott v. Woodward, 18 Ind. 183; Ohio &c. Ry. Co. v. McCartney, 121 Ind. 385, 23 N. E. 258; Brooks v. Dutcher, 22 Neb. 644, 36 N. W. 128. See, also, authorities cited in note to Strohn v. Detroit &c. R. Co., 99 Am. Dec. 135, and in 2 Elliott's Gen. Pr., § 907.

CHAPTER XIV.

SPECIAL INTERROGATORIES.

"This seems to be the true way to come at justice, and, therefore, what we ought to do."—*Lord Mansfield.*

Practical Suggestions.

In many of the states the statutes provide that interrogatories may be propounded to the jury, requiring them to find specially upon questions of fact. The practice has prevailed in some common-law jurisdictions, but, as a general rule, now prevails only in jurisdictions that have adopted what Pomeroy denominates "the reformed system of civil procedure." The practice seems at one time to have prevailed in England, but the interrogatories were asked by the English judges for a purpose different from that which the framers of the statutes had in view, for the purpose of those judges was to ascertain the grounds on which the jury found their verdict, while the leading purpose of the American statutes is to get the controlling facts in the record, so that the law may be applied to them by the court.[1] This, however, is not the sole object the statutes were intended to accomplish.

Interrogatories calling upon the jury to find specially upon questions of fact are often useful and effective, but it is not prudent to address them to the jury in every case. Jurors do not view the practice with favor, and it is not best to annoy them with a great number of questions, as is sometimes done, even if it were proper. It is in general better to submit a few clearly expressed interrogatories rather than a great number, He is not wise who

[1] See Goldsby v. Robertson, 1 Blackf. (Ind.) 247; Buntin v. Rose, 16 Ind. 209, 210; Morrow v. Comr's, 21 Kan. 484; Durfee v. Abbott, 50 Mich. 479; Ryan v. Rockford Ins. Co., 77 Wis. 611.

so frames his special interrogatories as to arouse a suspicion that they were designed to entrap jurors. This suspicion finds its way into the minds of jurors more often than one who has not given the subject thought, or conversed with jurors touching it, is apt to believe. If the interrogatories are made direct and clear, and can be made to appear fair on their face, and as though asked only for the purpose of eliciting the facts, the probability is strong that fair and full answers will be returned; but if once a suspicion is aroused that they were designed as a check or restraint, it is quite probable that the jury will lean strongly against the party by whom the interrogatories were propounded.

It is, in some instances, better to take a general verdict with answers to interrogatories than to depend entirely upon a special verdict. When this course is pursued, it is essential that the party who has the burden should be careful to ask no question that may imperil his case. The party who has a hard case, or a case resting on technical questions, or a case where the strong is arrayed against the weak, will do well, as a general rule, to take a special verdict. This is so for the reason that where a general verdict is returned, together with answers to interrogatories, the verdict will prevail, unless there is invincible repugnancy between it and the answers of the jury. It is, indeed, seldom that the answers overcome the general verdict. The advocate who hopes to prevail on the answers will, in most cases, be disappointed, for in very few cases will the general verdict be controlled by them; so that one who stands upon them has, at best, an insecure position. Intendments will be made in favor of the general verdict and against the special answers.[2] This is so for the reason that the general verdict is presumed to go to the whole case and award justice upon the law and the evidence, while the answers presumptively cover only isolated questions of fact. Of course, there are cases where the answers are of controlling importance, and in such cases, if there is no reason to anticipate prejudicial

[2] Rice v. City of Evansville, 108 Ind. 7, 9 N. E. 139; Redelsheimer v. Miller, 107 Ind. 485, 8 N. E. 447; Llewellyn v. Kansas Nat. Gas Co. (Kan.), 116 Pac. 221, 222; post, Rule 16.

answers from the jury, it is well enough to propound special interrogatories.

Where it is desired to keep prominently before the minds of the jury material facts, it is well to propound interrogatories. This is expedient in cases where there is reason to apprehend that the closing address may draw the minds of the jury from the controlling facts, for by this means their minds are directed into the proper channel. Where, however, counsel feel strong on the right and justice of the case, and fear only cold legal propositions or technical rules, they should not ask a single interrogatory. The expedient course for their adversaries is the very opposite. The books contain many cases in which juries have used every effort to evade interrogatories, without returning answers positively false, thus clearly proving their readiness to surrender specific points to what they conceive to be the natural equity or real right of the case. In cases where there is reason to fear that jurors will adopt such a course, the true plan is to demand a special verdict. In such cases the address of the counsel who asks the special verdict should not hint at the effect of the finding, but should be confined to a discussion of the evidence and its probative force. The policy of counsel asking the special verdict is to keep from the jury, as far as lies in his power, a knowledge of the ultimate effect of their decision upon the facts. The policy of opposing counsel, on the other hand, is to inform the jury as fully and as clearly as possible what the effect will be. A special verdict prevents the court from informing the jury what the ultimate result of their conclusions will be, since it dispenses with general instructions. Where, however, special interrogatories are propounded, it is the right, as well as the duty, of the court to give general instructions, so that, where it is resolved to let the case go to the jury without instructions, special interrogatories should not be asked, but a special verdict should be taken.

In cases where special interrogatories can be put, and so framed that an answer must be favorable to the party, they should, it is manifest, always be propounded. Thus, if a party should sue a municipal corporation for negligently leaving an unguarded

excavation in the street, and the evidence should show that the plaintiff knew of the excavation, then it would be politic for the defendant to ask two interrogatories: one eliciting the fact of the plaintiff's knowledge; one asking whether it was light or dark; for if the first be answered in favor of the defendant, then an answer to the second, whether it be that it was light or that it was dark, would probably be fatal to the plaintiff, since it would convict him of contributory negligence. It is, indeed, true, as a general rule, that interrogatories should be asked by the defendant in cases where negligence is the issue, and where the plaintiff's condition is such as to enlist the sympathies of the jury, or the situation of the defendant such as to excite their prejudices.

Interrogatories are often of great use to a master sued by a servant for injuries caused by defective machinery. In such cases the sympathies of the jurors are almost invariably with the servant, and, in a general verdict, they will affirm that the servant had no notice of the defect; but if required to answer interrogatories properly framed, they will be compelled to state such facts as conclusively show that the plaintiff had knowledge of the defect and yet remained in the master's service. In other cases of this general class, jurors, whose sympathies or prejudices have determined them to find for the maimed or injured person, will so strongly find upon the question of notice as to entirely exonerate the master from the charge of negligence; but if nothing more than a general verdict were demanded this result would not be revealed, so that to exhibit it, special interrogatories are required. In still other cases, where there is a like determination, produced by like causes, to find for the plaintiff, jurors will find so strongly upon the question of the defendant's negligence that if proper interrogatories are addressed to them they will convict the plaintiff of contributory negligence, since they will, in their eagerness to benefit the plaintiff, often so state the facts as to disclose negligence on the part of the defendant so great and apparent that it must have been known to the plaintiff.

Conclusions involved in a general verdict are sometimes honestly affirmed by jurors entirely free from the influence of passion or prejudice that they would not affirm if the question were sepa-

rately and directly submitted to them. This results in many instances from the inability of jurors to carry the specific facts of a complicated case in their minds; and where this is true, special interrogatories will bring to mind these forgotten facts and secure a just statement of them. For this reason it is often prudent for a party who desires that specific facts should be retained in memory to propound interrogatories, even though he has no reason to distrust the motives of the jury.

Another advantage sometimes gained by asking special interrogatories is in the effect of the answers in some instances incurring error in the instructions, or other irregularities. Of course, they do not always have this effect, and it is comparatively seldom that errors are thus cured. But where they show that the alleged error could not have affected the jury or prejudiced the prevailing party in any way, they will generally cure the error, as, for instance, where an instruction is not strictly correct, but the answers to special interrogatories show that the facts are against the complaining party on the matter in question.[8]

Interrogatories to the jury, like questions to a witness, are sometimes so adroitly framed as to seem to require a single indivisible answer, while, in truth, more than one question is implied and the answer is divisible. Such interrogatories perplex a jury, and not unfrequently mislead them. The safest course is to object to their form before they are submitted to the jury, and to demand that they be so framed as to prevent misconception. If this demand is refused, an exception should at once be taken and a bill tendered. If this course is not deemed expedient, then ask the court—and ask in writing—to instruct the jury that one answer may be made to a distinct part of a divisible question, and another answer to another part. It sometimes happens that interrogatories assume facts, and when this does happen, it is well to ask the court (make the request in writing) to instruct the jury that they are not bound to accept as true the assumptions, and that, to ascertain the truth, they must go to the evidence. It is

[8] Baum v. Palmer, 165 Ind. 513, 76 N. E. 108; Indianapolis &c. Trac. Co. v. Formes, 40 Ind. App. 202, 209, 210-213, 80 N. E. 872. See also, Lawler v. Earle, 5 Allen (Mass.) 22; Spurr v. Shelburne, 131 Mass. 429.

the right of a party to have interrogatories answered from the evidence, and he may rightfully ask the court to so inform the jury.

Where the answers are indefinite or evasive, the proper course is to ask the court, before the verdict is formally received, to recommit the interrogatories to the jury, with instructions to answer them according to the evidence. A motion for a judgment on the answers, notwithstanding the verdict, will not present the question; that procedure is only effective where the answers are inconsistent with the general verdict.

RULES OF LAW.

1. It is generally held in this country, contrary to the old English rule, the trial court may, in the absence of a statutory provision to the contrary, require the jury to answer special questions or interrogatories in addition to their general verdict.

Barstow v. Sprague, 40 N. H. 27-33; Smith v. Putney, 18 Me. 87; McMerton v. West Chester &c. Co., 25 Wend. (N. Y.) 379; Spaulding v. Robbins, 42 Vt. 90-93; Florence Machine Co. v. Daggett, 135 Mass. 582. See also 29 Am. & Eng. Ency. of Law (2d ed.), 1034.

2. The form and manner of propounding the interrogatories are matters in the discretion of the trial court, unless otherwise provided by statute.

Hackford v. New York &c. R. Co., 53 N. Y. 654; Allen v. Davison, 16 Ind. 416; American Co. v. Bradford, 27 Cal. 360; Louisville &c. R. Co. v. Worley, 107 Ind. 320, 7 N. E. 215; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335; Southern Kan. Ry. Co. v. Walsh, 45 Kan. 653, 26 Pac. 45.

3. Under the statutes in force in a number of the states, the submission of special questions or interrogatories to the jury, and answers thereto, may be insisted upon by either party as matter of right, while in yet other states the statutes upon the subject leave the matter in the discretion of the trial court.

See "Special Interrogatories to Juries," 20 Am. L. Rev., 366, 367, and statutes and authorities there cited.

Such statutes, however, do not govern the practice in the United States courts. Indianapolis &c. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898.

4. Where the statute provides that the court, at the request of either party, *may* submit special questions to the jury, the matter seems to be discretionary, and the refusal to do so has been held not to be erroneous;[1] but where the statute provides that it *shall* be done the court has no such discretion, but must comply with a proper request, made in due season.[2]

[1] Dempsey v. Meyer, 10 Daly (N. Y.) 417; McLean v. Burbank, 12 Minn. 530; Knahtla v. Oregon &c. Ry. Co. 21 Ore. 136, 27 Pac. 91; Pencil v. Home Ins. Co., 3 Wash. 485, 28 Pac. 1031.

[2] Noble v. Enos, 19 Ind. 72; Bower v. Bower, 142 Ind. 194, 41 N. E. 523 (citing 2 Elliott's Gen. Pr., § 911); Farnsworth v. Coots, 46 Mich. 117; Bent v. Philbrick. 16 Kan. 191; Zucker v. Carpeles, 88 Mich. 413, 50 N. W. 373.

In Indiana refusal to submit interrogatories cannot be assigned as independent error on appeal, but must be made a ground of motion for a new trial. New York &c R. Co. v. Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

5. Where the submission of special questions is discretionary the court may withdraw them at any time before they are answered;[1] but where the matter is one of right they cannot be withdrawn over the objection of the party at whose request they have been properly submitted.[2]

[1] Moss v. Priest, 19 Abb. Pr. (N. Y.) 314; Taylor v. Ketcham, 5 Robt. (N. Y.) 507; Florence Machine Co. v. Daggett, 135 Mass. 582.

[2] Summers v. Greathouse, 87 Ind. 205; Otter Creek &c. Coal Co. v. Raney, 34 Ind. 329.

6. A party desiring the submission of special interrogatories to the jury must make his request and submit his questions to the court in due season. After argument has commenced may be too late.

Ollam v. Shaw, 27 Ind. 388; Fleetwood v. Dorsey Machine Co. 95 Ind.

491; Hargrave v. Wellington, 8 Kan. 480; Burleson v. Burleson, 28 Tex. 383; Hopper v. Moore, 42 Iowa 563.

And it seems that the attorney for the opposite party has a right to see them before his argument to the jury is concluded. Wabash &c. Ry. Co. v. Tretts, 96 Ind. 450; Malady v. McEnary, 30 Ind. 273, 277. So in Iowa by statute. Crosby v. Hungerford, 59 Iowa 712. Where submitted by the court of its own motion it is held otherwise. Clark v. Ralls, 79 Iowa 189, 32 N. W. 327. In Indiana, and probably in most states, counsel may comment upon the interrogatories in the argument to the jury. McIntyre v. Omer, 166 Ind. 57, 70, 76 N. E. 750.

7. The interrogatories should be material, and should call for answers as to particular facts, and not for evidence or conclusions of law. If they violate this rule the court may properly refuse to submit them to the jury.

Trentman v. Wiley, 85 Ind. 33; Hatfield v. Lockwood, 18 Iowa 296; Manning v. Gasharie, 27 Ind. 399; Atchison &c. R. Co. v. Plunket, 25 Kan. 188; Crane v. Reeder, 25 Mich. 303; Dubois v. Compau, 28 Mich. 304; Ingalls v. Allen, 144 Ill. 535, 33 N. E. 203; Adler v. Metropolitan &c. R. Co., 138 N. Y. 173, 33 N. E. 935.

And it is not error to refuse to submit inconclusive interrogatories, the answers to which could have no influence on the general verdict. Louisville &c. R. Co. v. Pedigo, 108 Ind. 481, 8 N. E. 627; Miner v. Vedder, 66 Mich. 101, 33 N. W. 47; Dickerson v. Dickerson, 50 Mich. 37; City of Wyandotte v. White, 13 Kan. 191. See also, Lake Erie &c. R. Co. v. Morain, 140 Ill. 117, 29 N. E. 869; Rump v. Hiatt, 35 S. Car. 444, 15 S. E. 235; Peninsular Land &c. Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

8. There is no available error in refusing an interrogatory where another covering the same point is submitted and answered.

Missouri &c. R. Co. v. Reynolds, 31 Kan. 132; Terry v. Shively, 93 Ind. 413; Hopper v. Moore, 42 Iowa 563; Warden v. Reser, 38 Kan. 86, 16 Pac. 60. See also, Hamilton v. Buchanan, 112 N. Car. 463, 17 S. E. 159.

9. It is no objection that a question is leading; it is, in fact, better that it should be leading.

Rice v. Rice, 6 Ind. 100; Marshall v. Blackshire, 44 Iowa 475.

10. Where, as in Indiana and Iowa, and probably in other states, the right to have special questions answered is conditional upon the return of a general verdict by the jury, it is not error to refuse an unconditional request.

Shultz v. Cremer, 59 Iowa 182; Taylor v. Burk, 91 Ind. 252; Louisville &c. R. Co. v. Worley, 107 Ind. 320, 7 N. E. 215.

11. In all proper cases, the jury must answer the interrogatories submitted to them fully, fairly and without evasion.

Summers v. Greathouse, 87 Ind. 205; Buntin v. Rose, 16 Ind. 209; First Nat. Bank v. Peck, 8 Kan. 660; Dyer v. Taylor, 50 Ark. 314 7 S. W. 258.

An answer by the jury to a proper interrogatory that they "do not know" is insufficient, and they should be required to answer positively. Buntin v. Rose, 16 Ind. 209; and see Crane v. Reeder, 25 Mich. 303; Atchison &c. R. Co. v. Cone, 15 Pac. 499, 37 Kan. 567; Sage v. Brown, 34 Ind. 464; Cleveland &c. R. Co. v. Hayes, 167 Ind. 454, 79 N. E. 448.

But it is held that where there is no evidence on the point to which the question is directed, the jury may answer that there is none. Williamson v. Yingling, 80 Ind. 379; Pittsburgh &c. R. Co. v. Williams, 74 Ind. 462; Knight v. Knight, 6 Ind. App. 268, 33 N. E. 456. Compare also, Watson v. Chicago &c. R. Co., 46 Minn. 321, 48 N. W. 1129. See, however, Harriman v. Queen Ins. Co., 49 Wis. 71.

12. Objections to interrogatories should be made when they are submitted, or, at least, before the jury retire; otherwise they will be considered as waived.

Gerhardt v. Swartz, 57 Wis. 24; Many v. Griswold, 21 Minn. 506; Brooker v. Weber, 41 Ind. 426; Dupond v. Starring, 42 Mich. 492.

13. Where answers are uncertain, or not responsive to the questions, a motion to have the jury sent back and re-answer them should be made when the verdict is returned;[1] and where a question is not answered at all, and the jury are discharged without objection, the right to have such question answered will be considered as having been waived.[2]

[1] Bradley v. Bradley, 45 Ind. 67; Barton v. Sanger, 47 Wis. 500; Ar-

thur v. Wallace, 8 Kan. 267. Compare Spencer v. Williams, 160 Mass. 17, 35 N. E. 88.

[a] Brown v. Central &c. R. Co. (Cal.), 12 Pac. 512; Long v. Duncan, 10 Kan. 294; Vater v. Lewis, 36 Ind. 288, 10 Am. 29. But compare Tarbox v. Gotzian, 20 Minn. 139.

14. A statute requiring the verdict to be signed by the foreman of the jury applies to the answers to interrogatories.

Sage v. Brown, 34 Ind. 465. See also, Greenberg v. Hoff, 80 Cal. 81, 22 Pac. 69. But see as to waiver, Vater v. Lewis, 36 Ind. 288, 10 Am. 29.

15. Where the special findings of facts by a jury in answer to interrogatories are, when construed together, irreconcilably in conflict with the general verdict, they will control it; but if they are inconsistent with one another, contradictory and uncertain, the general verdict will control.

Grand Rapids &c. R. Co. v. McAnally, 98 Ind. 412; Rice v. Manford, 110 Ind. 596, 11 N. E. 283. See also, Gwin v. Gwin, 5 Idaho 271, 48 Pac. 295; Dickerson v. Waldo, 13 Okla. 189, 74 Pac. 505; Pardee v. Aldridge, 24 Tex. Civ. App. 254, affirmed in 189 U. S. 429, 47 L. ed. 883, 23 Sup. Ct. 514.

It is only where there is an irreconcilable conflict between the answers and the general verdict that the answers to interrogatories will control. Phelps v. Vischer, 50 N. Y. 59; Fort Wayne &c. R. Co. v. Beyerle, 110 Ind. 100, 11 N. E. 6; Lowden v. Pennsylvania Co., 41 Ind. App. 614, 82 N. E. 941; Lake Shore &c. R. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425; note in 6 L. R. A. 574.

16. All reasonable presumptions will be indulged in favor of the general verdict, and nothing will be presumed in favor of the special findings.

McComas v. Haas, 107 Ind. 512, 8 N. E. 579; Wright v. Chicago &c. R. Co., 160 Ind. 583, 66 N. E. 454; Consolidated Stone Co. v. Sunmist, 152 Ind. 297, 307, 53 N. E. 235; Ready v. Peavy Elevator Co., 89 Minn. 154, 94 N. W. 442. See, however, New York &c R. Co. v. Hamlin, 170 Ind. 20, 83 N. E. 343.

17. Where, as in case of several paragraphs of complaint and interrogatories confined to one of them, the special findings do

not cover all the issues, and are not inconsistent with the general verdict, as to other issues, the general verdict may control, notwithstanding inconsistency as to the issues covered by the findings.

Toledo &c. R. Co. v. Milligan, 52 Ind. 505; Frazer v. Bose, 66 Ind. 1; Cleveland &c. Ry. Co. v. Johnson, 7 Ind. App. 441, 33 N. E. 1004.

18. Where a party is entitled to judgment on the special findings in answer to interrogatories, he should move for judgment thereon, notwithstanding the general verdict; otherwise, no question concerning the right to such judgment can be made on appeal.

Bartlett v. Pittsburgh &c. R. Co., 94 Ind. 281; Campbell v. Dutch, 36 Ind. 504; Stockton v. Stockton, 40 Ind. 325; Trittipo v. Lacy, 55 Ind. 287; Johnson v. Miller, 82 Iowa 693, 47 N. W. 903; Shenners v. West Side &c. R. Co., 78 Wis. 382, 47 N. W. 622.

But where the special findings of fact are indefinite and uncertain, a motion for judgment on such findings, notwithstanding the general verdict, will be overruled. Sanders v. Weelburg, 107 Ind. 266, 7 N. E. 573. See also, German Ins. Co. v. Smelker, 38 Kan. 285, 16 Pac. 735; Williams v. Eikenberry, 22 Neb. 210, 34 N. W. 373; Warner v. United States Mut. Acc. Assn., 8 Utah 431, 32 Pac. 696.

CHAPTER XV.

SPECIAL VERDICTS.

"And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that, if upon the whole matter the court should be of opinion that the plaintiff had a cause of action, they find for the plaintiff; if otherwise, then for the defendant.'"—*Blackstone.*

Practical Suggestions.

It is often advisable to take a special verdict, when allowable, for a special verdict contains only facts, leaving to the court the ultimate decision of the cause.[1] By this course a responsibility is directly fastened upon jurors, and they are deprived of the shelter so often afforded by a general conclusion. Where the law and the facts are blended, jurors, as a general rule, are not quite so scrupulous as where they are required to find only upon the facts. General verdicts more readily than special ones supply a refuge for jurors whose minds are influenced by passion or prejudice; for, where the verdict is special, they cannot so easily evade the force of the evidence. Where there is reason to fear that improper motives may influence a jury, and the evidence is strongly against their prejudices, it is, in general, wise to ask a special verdict.

[1] For definition of special verdict, and distinction, between such a verdict and a general verdict, see 3 Blk. Com. *377; Bacon's Abr, title "Verdict;" Porter v. Western N. Car. R. Co., 97 N. Car. 66, 2 S. E. 581, 2 Am. St. 272. See also, Maxwell v. Wright, 160 Ind. 515, 67 N. E. 267; and note in 24 L. R. A. (N. S.) 1. A special verdict is also a very different thing from special findings in answer to interrogatories returned with a general verdict. See 2 Elliott's Gen. Pr., § 925; also McDougall v. Ashland Sulphite &c. Co., 97 Wis. 382, 73 N. W. 327; Morbey v. Chicago &c. Ry. Co., 116 Iowa 84, 89 N. W. 105, 107.

In cases where the defense is one which a juror is likely to regard as technical, a special verdict should be demanded. So, where the defense is founded upon the statute of frauds or the statute of limitations, or where a discharge in bankruptcy is relied on, and in like cases, it is, as a general rule, expedient to take a special verdict. So, too, where one party is a rich man, or a corporation, and the case is one which is likely to arouse prejudice, a special verdict will often counteract the sinister influence of prejudice. It is, indeed, true, as a general rule, that wherever the case is one strongly appealing to the passions or prejudices of a jury the better course is to take a special verdict. It is, of course, implied that the evidence is favorable to the party who asks a special verdict; for if it is against him, then he had better take the chances of a general verdict.

It is much more hazardous for the party who has the burden of proof to ask a special verdict than for the adverse party, since it is a well-settled rule that, if all the material facts are not found, the party who has the burden will be the sufferer.[2] It is for this reason that it is usually safer for the defendant than for the plaintiff to ask a special verdict. The absence of one material fact may preclude a recovery by the party upon whom the burden rests, while the statement of one controlling fact may secure success for the party not thus burdened.[3] It is manifest, therefore, that the party who has the burden should be very careful in asking a special verdict, and extremely vigilant in putting before the jury every material fact. Omission means disaster. On the other hand, the party to whom one material fact will bring sucess will be very unwise if he does not place that fact in a conspicuous position. It is to be kept in mind, however, that, where there is reason to suspect that the jury will find for the adversary, it is best not to allow them to see too clearly the effect the fact will have. Where this is the case, it is better to somewhat conceal the leading fact by close association with facts of less importance.

[2] Tidd's Pr., *896n; Glantz v. City of South Bend, 106 Ind. 305, 6 N. E. 632; Pittsburgh &c. R. Co. v. O'Brien, 142 Ind. 218, 222, 41 N. E. 528. See also, Collins v. Riley, 104 U. S. 322, 26 L. ed. 752.

[3] Rice v. City, 108 Ind. 7; 58 Am. 22.

A special verdict is sometimes a means of preventing defeat where the judge is unfavorable; for, although it is true that the jury find only the facts, leaving exclusively to the court the duty of declaring the law, yet the manner of instructing the jury often exhibits to them the opinion of the judge, and induces them to surrender to his opinion their own convictions. This is true even where the judge instructs only upon propositions of law, and where there are no errors in his instructions; for meaning and desire are often conveyed by manner and emphasis as well as by words. Where the facts are found by the jury, then the judge can do nothing more than apply the law to the facts so found, for in such a case there is no necessity for general instructions. All that the judge can properly do in such a case is to give appropriate instructions as to the frame of the verdict and as to general rules of evidence.[4] In doing this there is little opportunity for intimating his own opinion to the jury.

A special verdict must state the facts, and not the evidence which establishes them. It is, too, the inferential, or ultimate, and not the evidentiary, facts that must be embodied in the verdict.[5] It is not always easy to discriminate between facts and evidence, nor between facts and conclusions, for the line of separation is very often shadowy and indistinct. If there must be error, it is better to have too much in the verdict than too little; but care must be taken that there are no material inconsistencies, for he who has the burden may have his case ruined by inconsistencies and contradictions which neutralize the ultimate facts found in his favor. The nearer a special verdict can be brought to state fully, yet concisely, the material facts, the nearer it is brought to perfection. If it states mere conclusions and mere evidence without facts, the judgment must be adverse to him who has the burden, or else a *venire de novo* must be awarded. If it is in-

[4] Louisville &c. R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Indianapolis &c. R. Co. v. Bush, 101 Ind. 582.

[5] Locke v. Merchant's National Bank, 66 Ind. 353; Dixon v. Duke, 76 Ind. 575. See also, Fryer v. Roe, 12 C. B. 437, 74 E. C. L. 437; Sisson v. Barrett, 2 N. Y. 406; Brown v. Ralston, 4 Rand. (Va.) 504; Monticello Bank v. Bostwick, 77 Fed. 123, 23 C. C. A. 73; 2 Elliott's Gen. Pr., § 931.

complete and inconsistent on its face, the general rule is that it will be set aside upon the proper motion, so that he who prepares it needs bring to his work skill and care.[6]

It is not prudent to intrust to any jury the work of preparing a special verdict. It is a work that calls into exercise skill and care, and should not be done, if it can be avoided, under pressure or excitement. The young advocate will be wise if he prepares at least a skeleton of a special verdict in advance of the trial, and the veteran who pursues a like course will not err. It is difficult to marshal and array facts, and the work is one that requires care and thought. In every instance, the form of the verdict which it is proposed to submit to the jury ought to be in the hands of the court a reasonable length of time before the case is given to the jury; for it is the right of the court to have a reasonable time to inspect the draft which it is proposed to lay before the jury.

A special verdict, when well drawn, is an excellent method of getting the facts into the record in cases where there is reason to believe that an appeal will be necessary. This method, in most cases, dispenses with a bill of exceptions, and renders it unnecessary to encumber the record with the evidence. Where, however, the conclusions of the jury are not sustained by the evidence, or are contrary to the evidence, it is necessary to incorporate the evidence in the record; but this course is only advisable where there is no material evidence supporting the conclusions; for, if there is a conflict of evidence, the appellate court will not disturb the findings of the jury.

[6] Tidd's Pr. (4th Am. ed.), 897, n.; Pittsburgh &c. Co. v. Spencer, 98 Ind. 186; Indianapolis &c. R. Co. v. Bush, 101 Ind. 582.

RULES OF LAW.

1. A special verdict is a finding of the facts in a case by the jury with a conditional conclusion that, if upon such facts the law is for the plaintiff, then they find for the plaintiff; if for the defendant, then they find for the defendant.

Mumford v. Wardwell, 6 Wall. (U. S.) 423, 18 L. ed. 756; 3 Black. Com.

*377; Cook v. Gerrard, 1 Saund. 171a; 29 Am. & Eng. Ency. of Law (2d ed.), 1028.

2. In the absence of any statutory provision upon the subject, it is optional with the jury whether their verdict shall be general or special.

Steph. Pl., *92. See also, Devizes v. Clark, 3 Ad. & El. 406, 30 E. C. L. 135; Dowman's Case, 9 Coke 12, 4 Minor's Inst., 833. Compare Chicago &c. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15.

3. Where the jury have, by statute, the right to render a special verdict, refusal of the court, upon request of a party, to instruct them that they have such right is error.

Adams Express v. Pollock, 12 Ohio St. 618.

Under some statutes, the court must, upon request, direct the jury absolutely to return a special verdict. Bird v. Lanius, 7 Ind. 615; Hopkins v. Stanley, 43 Ind. 553. See also, Woodward v. Woodson, 6 Munf. (Va.), 227.

But even under such a statute, where a special verdict is not demanded, the court is not bound to submit to the jury a form of special verdict prepared by a party. Woollen v. Whitacre, 91 Ind. 502.

4. It is proper, and, indeed, customary, for the counsel to prepare a form of special verdict for the jury, subject to the correction of the court.

Mumford v. Wardwell, 6 Wall. (U. S.) 423, 18 L. ed. 756; Hopkins v. Stanley, 43 Ind. 553; 2 Tidd's Pr., 897.

5. The jury are not bound to adopt the draft of a special verdict prepared for them by a party, but may either modify it or frame one for themselves.

Hopkins v. Stanley, 43 Ind. 553; Miller v. Shackelford, 4 Dana (Ky.) 264.

6. A special verdict should find facts, and not evidence;[1] nor should it state conclusions of law.[2]

[1] Dixon v. Duke, 85 Ind. 434; LaFrombois v. Jackson, 8 Cow. (N. Y.)

589, 18 Am. Dec. 463; Sisson v. Barrett, 2 N. Y. 406, 407; Ross v. United States, 12 Ct. Cl., 565; 2 Elliott's Gen. Pr., § 931, 29 Am. & Eng. Ency. of Law (2d ed.), 1030; State v. Hanner, 143 N. Car. 632, 57 S. E. 154, 24 L. R. A. (N. S.) 1, and elaborate note on special verdicts.

[2] Conner v. Citizens' St. R. Co., 105 Ind. 62, 4 N. E. 441; Keller v. Boatman, 49 Ind. 104; Hankey v. Downey, 3 Ind. App. 325, 29 N. E. 606; Ross v. United States, 12 Ct. Cl. 565; 2 Elliott's Gen. Pr., § 931.

7. Where a special verdict, otherwise sufficient, contains findings of evidence, conclusions of law, or matters without the issues, such portions will be disregarded by the court in rendering judgment.

Indianapolis &c. R. Co. v. Bush, 101 Ind. 583; Louisville &c. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; note in 24 L. R. A. (N. S.) 1.

8. Nothing can be taken by the court by implication or intendment in favor of a special verdict,[1] and it cannot be aided by the evidence, or any other extrinsic matter.[2]

[1] Commonwealth v. Call, 32 Am. Dec. 284, and note, 289; People v. Williamsburg &c. Co., 47 N. Y. 586; Noblesville &c. Co. v. Loehr, 124 Ind. 79, 24 N. E. 579; Lofft., 573; 2 Elliott's Gen. Pr., §§ 932-933.

[2] Tuigg v. Treacy, 104 Pa. St. 493; Commonwealth v. Grimes, 116 Pa. St. 450, 9 Atl. 665; Brock v. Louisville &c. R. Co., 114 Ala. 431, 21 So. 994; Bartow v. Northern Assur. Co., 10 S. Dak. 132, 72 N. W. 86; Daube v. Philadelphia &c. Iron Co., 77 Fed. 713, 23 C. C. A. 420; Locke v. Merchants' Nat. Bank, 66 Ind. 353. Proffatt on Tr. by Jury, § 437.

9. To justify a judgment in favor of the party on whom the burden of the issues rests, the special verdict must find all the facts necessary for him to prove in order to recover.

Goldsby v. Robertson, 1 Blkf. (Ind.) 247; Vinton v. Baldwin, 95 Ind. 434; People v. Williamsburg &c. Co., 47 N. Y. 586-596; Pittsburgh &c. Co. v. Spencer, 98 Ind. 180; Noblesville &c Co. v. Loehr, 124 Ind. 79, 24 N. E. 579. See also, Coleman v. St. Paul &c. R. Co. 38 Minn. 260, 36 N. W. 638.

And where a special verdict is returned in a criminal case, all the facts

constituting essential elements of the offense charged must be found in order to sustain a conviction. Commonwealth v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; Commonwealth v. Dooly, 6 Gray (Mass.) 360. See also, State v. Hanner, 143 N. Car. 632, 57 S. E. 154, 24 L. R. A. (N. S.) 1, and note.

10. A party deeming himself entitled to judgment on the special verdict should move for judgment thereon, and if his motion is overruled he should save an exception.

Austin v. Earhart, 88 Ind. 182, opinion, 183; Dixon v. Duke, 85 Ind. 484.

11. Where a defective special verdict is returned, the court should either send the jury out to perfect their verdict, or grant a *venire de novo,* upon motion therefor, in a proper case.

Louisville &c. R. Co. v. Balch, 105 Ind. 93, 4 N. E. 288-292; Ft. Wayne v. Durnell, 13 Ind. App. 669, 42 N. E. 242; Kansas Pac. R. Co. v. Pointer, 14 Kan. 37, 51. See also, Ward v. Cochran, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. 230; State v. Whitaker, 89 N. Car. 472.

But if the verdict state facts sufficient to support a judgment, regardless of conclusions of law, or evidence improperly stated therein, a *venire de novo* should not be granted. Pittsburgh &c. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187. And see Gregory v. Frothingham, 1 Nev. 253; Pierce v. Schaden, 62 Cal. 283, as to rejection of surplusage.

And a failure to find a fact in favor of the party having the burden, being in effect a finding against such party, cannot ordinarily be reached by a *venier de novo* in case of a special verdict, and the remedy in such case, if any, is usually by motion for a new trial, even though it might have been by *venire de novo* in case of a general verdict. Maxwell v. Wright, 160 Ind. 515, 67 N. E. 267. See also note in 24 L. R. A. (N. S.) 1, 74-77.

CHAPTER XVI.

THE VERDICT AND ITS INCIDENTS.

"When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury."—*Blackstone.*

Practical Suggestions.

Receiving the verdict is not always a pleasant duty. The moment the twelve men file into the box with their verdict the anxiety of the advocate becomes intense. The interval between the time the jurymen take their seats and the announcement of the verdict is a trying one, and many an advocate's face has paled and his heart grown still in that time of dreadful suspense. Receiving the verdict is a duty that tries an advocate as few things try mortals, but it is, nevertheless, a duty that must be performed.

It is always the duty of counsel to be in court when the verdict is delivered. It may sometimes be expedient to poll the jury, since discontented jurors sometimes avail themselves of the opportunity afforded by the poll to withdraw their assent to the verdict. In not a few instances a poll has brought an outspoken dissent. In other cases it may happen that there is some informality in the verdict that should be corrected before the discharge of the jury. In still other cases it may be important to require that answers to interrogatories be made more specific. Sometimes, too, it is essential to secure corrections in computations, and it also frequently happens that there are mistakes apparent on the face of the verdict that should be corrected before the jury are discharged. The presence of counsel may be necessary to prevent error in receiving and recording the verdict, or in discharging the jury. In short, many things demand the personal attendance of counsel.

Promptness in directing attention to apparent errors and informalities in verdicts is essential. After the discharge of the jury corrections cannot be made, but corrections may often be secured before the jury are discharged. Many objections are available only when made before the discharge of the jury. Motions for a new trial and for a *venire de novo* should be made without undue delay. The counsel of the successful party should, without unnecessary delay, move for judgment on the verdict. He should see that the judgment is duly recorded. If the case is not an ordinary one, he should prepare the judgment, and all necessary entries. It is, indeed, always best to prepare forms of verdicts for the jury, as well as entries for the clerk.

An advocate's duty is not done when the addresses to the jury are concluded. It is his duty to be present and hear the instructions and directions of the court to the jury. It is his duty to see to it that, when the addresses are concluded, no improper papers go to the jury, and that nothing is wrongfully done that may injure the cause of his client. It is not to be forgotten that, from the time the cause goes into court until the last step is taken, it is in the alvocate's sole charge, and requires his undivided and concentrated attention.

RULES OF LAW.

1. The verdict of the jury should be returned in open court,[1] and the parties and their counsel should, at least, be given an opportunity to be present; but it is the duty of counsel to be in court at the proper time.[2]

[1] Rosser v. McColly, 9 Ind. 587; Tube v. Eber, 19 Ind. 126; Commonwealth v. Tobin, 125 Mass. 203, 28 Am. 220; Proffatt's Jury Tr., § 452, *et seq.*; Thomp. & M. on Juries, § 338. But see King v. Faber, 51 Pa. St. 387.

[2] Perry v. Mulligan, 58 Ga. 479; Stiles v. Ford, 2 Col. 128; Reilly v. Bader, 46 Minn. 212, 48 N. W. 909.

In criminal cases, the accused should, as a general rule, be present. State v. Jenkins, 84 N. Car. 812, 37 Am. 643; Temple v. Commonwealth, 14 (Ky.) 769, 29 Am. 442. But it is held that this may be waived. State v. Waymire, 52 Ore. 281, 97 Pac. 46, 132 Am. St.

699; State v. Way, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. (N. S.) 603; 12 Cyc., 528.

The court cannot depute the clerk to receive the verdict and discharge the jury. Willett v. Porter, 42 Ind. 250; Trout v. West, 29 Ind. 51. But see State v. Austin, 108 N. Car. 780.

2. Where necessary, court may be opened and the verdict received on Sunday.

Reid v. State, 53 Ala. 402, 25 Am. 627; Coray v. Silcox, 5 Ind. 370. And see authorities cited in note to Coleman v. Henderson, 12 Am Dec. 290, 291. See also note in 7 L. R. A. 327.

3. The verdict should be definite and positive in form;[1] but it will not be bad for mere informality where it is sufficient to show what the finding really is upon the issues presented.[2]

[1] 3 Bouv. Inst., § 3270; Proffatt's Jury Tr., § 414; Richards v. Tabb, 4 Call (Va.) 522. And see "Verdicts in Civil Cases," 22 Cent. L. J., 101; also, 2 Elliott's Gen. Pr., § 939; 29 Am. & Eng. Ency. of Law (2nd ed.), 1016.

[2] Jones v. Julian, 12 Ind. 274; Pejepscot Proprietors v. Nichols, 1 Fairf. (Me.) 256; Hilliard's New Tr., 134, *et seq.* And see Miller v. Morgan, 143 Mass. 25, 8 N. E. 644; Rembaugh v. Phipps, 75 Mo. 422; Snyder v. United States, 112 U. S. 216, 28 L. ed. 697, 5 Sup. Ct. 118; Gallot v. United States, 87 Fed. 446, 31 C. C. A. 44.

4. Where there is nothing to prevent, equivocal language should be taken in the sense most favorable to the verdict,[1] and mere surplusage will be disregarded.[2]

[1] Hilliard's New Tr., 133; Goss v. Withers, 2 Burr., 693. See also, Woodward v. Davis, 127 Ind. 172, 26 N. E. 687; Nye v. Manwell, 14 Vt. 14.

[2] Patterson v. United States, 2 Wheat. (U. S.) 221, 4 L. ed. 224; Veatch v. State, 60 Ind. 291; Ashton v. Touhey, 131 Mass. 26; Brigg v. Hilton, 99 N. Y. 517. See also, Henson v. State, 120 Ala. 316, 25 So. 23; Martin v. Ohio River R. Co., 37 W. Va. 349, 16 S. E. 589.

5. The verdict must conform to the issues and be responsive thereto;[1] but where it appears that all questions in the case are

really settled, and no injury is done by the failure to find on all the isues, the verdict will be sufficient.[2]

[1] Hilliard's New Tr., 143; 3 Bouv. Inst., § 3268; Bishop v. Kaye, 3 B. & Ald., 605; Patterson v. United States, 2 Wheat. (U. S.) 221, 4 L. ed. 224; Moore v. Moore, 67 Tex. 293, 3 S. W. 284; 2 Elliott's Gen. Pr., § 942.

[2] 3 Bouv. Inst., § 3269; White v. Bailey, 4 Conn. 272; Hanna v. Mills, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216. See also, Reed v. Gentry, 7 Ore. 497.

6. A sealed verdict may be returned by agreement of parties, but this does not dispense with the presence of the jury in open court,[1] unless expressly waived.[2]

[1] Young v. Seymour, 4 Neb. 86; Trout v. West, 29 Ind. 51; Rigg v. Cook, 4 Gilm. (Ill.) 336, 46 Am. Dec. 462.

[2] Koon v. Phœnix Mut. Life Ins. Co., 104 U. S. 106, 26 L. ed. 670; Pierce v. Hasbrouck, 49 Ill. 23. But see Willett v. Porter, 42 Ind. 250. As to amendment of sealed verdict, see note to Grant v. State, 23 L. R. A. 732.

It has been held in several cases that a sealed verdict may be returned even in a criminal cause without the prisoner's consent. Commonwealth v. Costello, 128 Mass. 88; Commonwealth v. Heller, 5 Phila. 123. And see authorities cited in note to McKinney v. People, 43 Am. Dec. 86. But not in some states. State v. Fertig, 84 Iowa 79, 50 N. W. 79; Anderson v. State, 2 Wash. 183.

7. In most jurisdictions either party has an absolute right to have the jury polled, whether the verdict be oral or sealed,[1] but the examination of each juror must be confined to a single question, namely: "Is this your verdict?"[2]

[1] Hirsh on Juries, § 627; James v. State to use of Doss, 55 Miss. 57, 30 Am. 496 and note; Warner v. New York &c. R. Co., 52 N. Y. 437, 11 Am. 724; Stewart v. People, 23 Mich. 63, 9 Am. 78.

[2] Bowen v. Bowen, 74 Ind. 470; Labor v. Koplin, 4 N. Y. 547; State v. Bogain, 12 La. Ann. 264; 1 Bish. Crim. Pro., § 1003.

In Colorado, Connecticut and Massachusetts, and, perhaps, in some other states, this seems to be a privilege allowable in the discretion of the court rather than an absolute right. Hindrey v. Williams, 12 Pac. 436; Commonwealth v. Costley, 118 Mass. 1; State v. Hoyt, 47 Conn. 533, 36 Am. 89. And where the court directs the verdict no

such right exists. McLaren v. Indianapolis &c. R. Co., 83 Ind. 319; Donoghue v. Indiana &c. Ry. Co., 87 Mich. 13, 49 N. W. 512.

8. Where a verdict is duly returned, but upon being polled one juror dissents, no valid judgment can be rendered thereon.[1] In such case the jury should either be discharged,[2] or sent back for further deliberation.[3]

[1] Scott v. Scott, 110 Pa. St. 387, 2 Atl. 531.

[2] Id., opinion, 532.

[3] Tyrell v. Lockhart, 3 Blackf. (Ind.) 136; Warner v. New York &c. R. Co., 52 N. Y. 437, 11 Am. 724; 2 Hale's P. C. 299. And see Thomp. & M. on Juries, § 337.

9. The jury may amend or change their verdict at any time before it has been recorded, or they have been, either in form or in fact, discharged.

3 Bouv. Inst., § 3271; Proffatt on Jury Tr., § 456. And see leading article in 20 Cent. L. J., 145-147, and cases therein cited. See also, note to Grant v. State, 23 L. R. A. 723.

10. The jury may be required by the court to make their verdict more definite and complete, or otherwise amend it when necessary.

Proffatt on Jury Tr., § 457; 1 Bish. Crim. Pro., § 1004. See also, Clark v. Sidway, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. 327; note to Grant v. State, 23 L. R. A. 23; 2 Elliott's Gen. Pr., § 947.

11. Informalities in a verdict may be corrected by the court; and wherever the finding upon the point in issue can be determined, the court will usually mold the verdict into proper form and give it due and legal effect.

Humphreys v. Mayor &c., 48 N. J. L. 588, 7 Atl. 301; Stewart v. Fitch, 31 N. J. L. 17; Hodgkins v. Mead, 119 N. Y. 166, 23 N. E. 559; Osborne & Co. v. Morris, 21 Ore. 367, 28 Pac. 70. And see "Amendment of Verdicts," 20 Cent. L. J., 145-147; also, note to Wood v. McGuire's Children, 63 Am. Dec. 246-248.

12. Objections to the form of a verdict should be made at the time it is returned and before it is recorded.

Bridge v. Hilton, 99 N. Y. 517. But there are cases in which amendments have been allowed years after the recording of the verdict. Matheson v. Grant, 2 How. (U. S.) 263. And see article in 20 Cent. L. J., 145, heretofore referred to.

13. After the verdict has been recorded, and the jury discharged, they cannot be reassembled to reconsider or amend their verdict.

Snell v. Bangor &c. Co., 30 Me. 337; Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393-397; Rigg v. Cook, 46 Am. Dec. 462; Trout v. West, 29 Ind. 51; St. Clair v. Caldwell, 72 Ala. 527; note in 23 L. R. A. 732. But see Dearborn v. Newhall, 63 N. H. 301; Burlingame v. Central R. Co., 23 Fed. 706.

14. A quotient verdict or a chance verdict is unauthorized and will be set aside upon a proper showing.

Williams v. Dean, 134 Iowa 216, 111 N. W. 931, 11 L. R. A. (N. S.) 410; Mitchell v. Ehele, 10 Wend. (N. Y.) 595; Chicago &c. R. Co. v. McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; Boynton v. Turnbull, 45 N. H. 408. See also, note in 11 L. R. A. 706. It is usually made ground for a new trial as misconduct of the jury. Chicago &c. R. Co. v. McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769. But it cannot, in most jurisdictions, be proved by the jurors themselves. Vaise v. Delaval, 1 T. R. 11; Stanley v. Sutherland, 54 Ind. 339; Gardner v. Minea, 47 Minn. 295, 50 N. W. 199; 2 Thomp. Tr., § 2618; Houk v. Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706 and note; also note to Bartlett v. Patton, 5 L. R. A. 523.

CHAPTER XVII.

WITHDRAWING THE CASE FROM THE JURY.

"The shrewd lawyer gets many cases away from the jury and puts them before the court."

Practical Suggestions.

There are many cases in which one, at least, of the parties would feel much safer in the hands of the court than in the hands of the jury; but there are comparatively few cases, where issues of fact are joined, which can be taken from the jury. Ordinarily, the case must be laid before the jury, as that is the tribunal the law has established for the trial of questions of fact in actions at law. It is, perhaps, wise that the jury system should keep its place in our system of remedial justice.[1] There are, however, cases which a court will try with more impartiality and with better judgment than a jury. Some of the cases which are better tried by the court than by the jury we have already mentioned.[2]

If a party desires to withdraw a case entirely from the jury, and get all the evidence into the record, he may do so by demurring to the evidence. By this course, a bill of exceptions is dispensed with, and the court applies the law to the facts which the evidence conduces to prove. The case may, by this means, be taken entirely from the jury, except in so far as the damages are concerned; for the damages must be conditionally assessed by

[1] Justice Miller says: "And I am bound to say that an intelligent and unprejudiced jury, when such can be obtained, when they are instructed in the law with such clearness, precision and brevity as will present their duty in bold relief, are rarely mistaken in regard to facts which they are called upon to find." 18 Alb. L. J. 405, 409.

[2] *Ante*, Bk. I, Chap. V; Bk. II, Chap. XV.

the jury before whom the evidence has been delivered, or, in case the court decides adversely to the party who demurs, a new jury may be called to assess them.

A demurrer to the evidence cannot, ordinarily at least, be taken by a party who has the burden of proof. This must be so on principle, for a demurrer confesses the truth of all the evidence adduced, and consents that all reasonable inferences that a jury might have drawn from it may be drawn by the court; and as it must confess all the evidence and all reasonable inferences, it cannot be employed by one who has the burden of establishing what he alleges. He cannot call upon his adversary to confess that his evidence is trustworthy, or that the facts essential to his success are established.[3]

In strictness, the demurrer is to the facts which the evidence tends to prove, and not to the evidence itself. It reaches the object rather than the means by which it is attained. It follows, therefore, that the facts which the evidence directly or indirectly tends to prove must be taken as admitted. The issue of fact is conclusively ended, and an issue of law merges the whole controversy.

It is evident that a party who demurs to the evidence incurs a great risk, since he confesses all the facts which the evidence directly or indirectly tends to prove. This is so, even though there be contradictory evidence, for, of necessity, only evidence tending to prove facts favorable to the party against whom the demurrer is directed can be regarded; all other evidence is withdrawn. This conclusion inevitably results when it is affirmed, as it must be, that it is the facts which the evidence tends to prove, and not the evidence, merely, that the demurrer confesses.

Although there is much danger in demurring to the evidence, yet the procedure is sometimes expedient. The danger which the demurring party encounters makes it necessary to proceed with great caution, and he who employs a demurrer needs be very sure that there is an absolute failure of evidence. The course is ex-

[3] Gould on Pleading, 449. See also, Pickel v. Isgrigg, 6 Fed. 676.

pedient when the evidence, even though it may prove some cause of action, does not tend to prove that upon which issue is joined.[4]

Jurors who perceive that a right has been invaded and damages inflicted will not, if they can possibly avoid it, put away a plaintiff without compensation. They will not stop to consider what cause of action is proved; it is enough for them to know that a wrong has been done and an injury suffered. The slightest pretext will serve to carry them against the law, however clearly and strongly it may be stated in the instructions of the court. No presumption so violent, nor any inference so strained, that they will not make in such a case, for, led by their crude notions of justice, they will put aside the law with little hesitation. They will not consider that a party called to answer one cause of action ought not, in fairness or good conscience, be mulcted in damages upon another and different cause. But the court will consider that matter, and will not suffer a recovery unless the facts confessed establish the cause of action stated in the complaint or declaration. Nor will the court draw any forced or violent inferences, for it will allow weight only to such as are natural and reasonable.[5]

Where there is no evidence tending to prove a material fact essential to a cause of action, and the prejudices and sympathies of the jury are with the plaintiff, it is safe to demur to the evidence.[6] It is, indeed, expedient to demur in such cases, for by this means the evidence is brought into the record, and the court necessarily decides upon its probative force, as well as upon the law. We do not mean, of course, that the court will weigh the evidence, for that it will not do; but it will apply to it the just and reasonable rules of inference, rejecting all violent and unnatural processes, and ascertain its just probative force. A jury will not

[4] See Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672; Palmer v. Chicago &c. R. Co., 112 Ind. 250, 14 N. E. 70; Marcum v. Smith, 26 Mo. App. 460. But not where there is a mere variance that might be cured by verdict.

[5] Palmer v. Chicago &c. Co., 112 Ind. 250, 14 N. E. 70; Gould's Pl., 448; Pawling v. United States, 4 Cranch (U. S.) 219, 2 L. ed. 601.

[6] See Lyons v. Terre Haute &c. Co., 101 Ind. 419.

be so conservative; for, in the very great majority of cases of that class, they will disregard all rules of reason and law, and let their prejudices or their passions dictate their verdict. This many jurors will do without a suspicion that there is a tinge of wrong in their course, while others will perversely persist in doing what they cannot well avoid knowing is forbidden by law.

Trial judges are, it is well known, averse to disturbing verdicts, and sometimes suffer verdicts to stand that should be promptly set aside. In some instances this occurs for the reason that a relentless press of business prevents the judge from giving the facts a careful study, and he feels that he ought not, with his inadequate information, set aside the decision of men he rightfully presumes were impartial triers. In other instances he feels that he ought not to substitute his own judgment for that of the twelve men adjudged by law to be competent judges of the facts. Doubtless, it would be better if verdicts were more often sternly and promptly set aside; but it is manifest that, in most cases, the duty is a very delicate one, and it is, therefore, no marvel that judges are reluctant to exercise the power vested in them. When the case comes to the appellate court there is still greater reluctance to disturb the finding of the jury on the facts. There are obvious reasons for this reluctance, only one of which we need mention, and that is: the verdict comes to the appellate court with the approval of the trial judge, given after the verdict has passed his examination. Where, therefore, there is just reason to believe that there is an absolute want of evidence it is well to demur to the evidence, since such a course relieves the trial judge from the duty of impliedly rebuking the jury, and puts the whole matter in his hands. He may decide without the suspicion of arrogating to himself knowledge or impartiality not possessed by the jury, for the right and the duty of deciding are directly put upon him in the first instance. We hazard the opinion that it would promote justice if the rules respecting demurrers to evidence were relaxed, and a more liberal practice established. The ancient rigor has, indeed, been much abated, but it might be still further relaxed with benefit to courts and parties. The reason for the rigorous application of the rule seems to have been that the procedure was thought to

be an encroachment upon the province of the jury as the judges of the facts, but it is evident that this reason has very little strength. The judges who displayed their zeal for the rights of the jury by so hedging in the office of a demurrer to the evidence cannot be justly allotted much credit for consistency, for in their charges to the jury they did not scruple to advise them how to decide questions of fact.

While a demurrer to the evidence is sometimes advantageous because it casts the responsibility upon the court and secures a decision putting an end to the controversy, yet the very fact that a ruling on it may conclusively settle the controversy constitutes an element of danger. If a court errs in favor of the demurring party, and a reversal is adjudged on appeal, there is no opportunity for a new trial, for the facts remain confessed of record. There is no escape in such a case from an adverse judgment. This consideration will increase the caution of a prudent advocate, and deter him from demurring to the evidence, unless he is very confident that his demurrer is well taken.

The party who resolves to demur to the evidence should be very careful in his cross-examination of the witnesses. It is useless in such a case to cross-examine for the purpose of exposing the falsity of a witness's testimony, as the facts his testimony tends to establish will be taken as true, although its falsity is apparent on its face. Nor can good be accomplished by inducing him to state facts favorable to the cross-examiner, unless such facts, when elicited, will stand uncontradicted; for, if contradicted, they will be regarded as withdrawn. The probability of doing harm by a cross-examination is infinitely greater than that of doing good. If there is any cross-examination at all, it should be very brief, and addressed to immaterial matters. An apparent cross-examination of the briefest character is the best. It should be conducted without any attempt to do more than conceal from the adverse party the intention to demur to the evidence, for the danger of harm is too great to be encountered while there is scarcely a bare possibility of doing any good.

There are other modes by which a case can be taken from the

jury. One is by a motion for a nonsuit. "A nonsuit," says Mr. Heard, "is where a judge who has not the power of deciding the facts rules, as a matter of law, that there is no evidence on which the jury, or whatever tribunal had to decide the facts, could properly find facts sufficient to support the plaintiff's case."[7] The practice of granting a compulsory nonsuit is not uniform, and varies greatly in different jurisdictions; there are, indeed, some jurisdictions in which the practice is almost unknown. The author from whom we have quoted, in comparing the mode of taking the case from the jury by a motion for a nonsuit with that of a demurrer to the evidence, says: "In practice in New York, and some other states, this demurrer is now superseded by a motion for a nonsuit at the close of the plaintiff's evidence. And this practice has, over a demurrer to the evidence, the advantage of being more comprehensive, including cases where, by reason of the great preponderance of the evidence against the plaintiff, no verdict should be allowed, which a demurrer to evidence would hardly reach. A nonsuit should be granted in all cases where the evidence is such that the court, on review, would set aside a verdict (for the plaintiff) founded on it."[8] Where the rule as stated by this author prevails, there the practice of moving for a nonsuit is preferable to that of demurring to the evidence, except in cases where it is desired by the defendant that the judgment shall be conclusive. Where it is desired to prevent subsequent actions, and end all litigation, it is better to adopt some other course than that of moving for a compulsory nonsuit, for the general rule is that a judgment as upon a nonsuit does not prevent the plaintiff from suing again on the same cause of action.[9]

[7] Gould's Pl. (Heard's ed.), 557. See also, note to French v. Smith, 24 Am. Dec. 622.

[8] Gould's Pl. (Heard's ed.), 446, n. 7. Many cases from the New York reports are given in Baylies' Trial Practice, § 25, p. 217. But see Kerwan v. American Lithographic Co., 197 N. Y. 413, 90 N. E. 945, 27 L. R. A. (N. S.) 972.

[9] Freeman on Judg. (3d ed.), §§ 261, 261a; Wells' *Res Adjudicata*, 375. See also, Hendrick v. Clonts, 91 Ga. 196, 17 S. E. 1019; Clapp v. Thomas, 5 Allen (Mass.) 158.

A simple, and sometimes very effective, method of taking the case from the jury, is by instructing them to find for the one party, or for the other. Where the plaintiff wholly fails to make out a case, the defendant is entitled to an instruction directing the jury to return a verdict in his favor. If the evidence of the defendant entirely answers and overthrows that of the plaintiff, not leaving him a *prima facie* case, the former is entitled to an instruction requiring the jury to give him the verdict. On the other hand, if the defendant's evidence wholly fails to meet that of the plaintiff, or to establish any affirmative defense, it is the plaintiff's right to have the jury so instructed. Neither party is, however, entitled to such an instruction where there is a conflict of evidence upon a material point.[10] Where there is anything more than a scintilla of evidence, all questions of fact must be decided by the jury, for the court cannot, in cases where there is a real conflict of evidence, usurp the functions of the jury.

In general, the party who has the burden cannot successfully ask an instruction that a verdict be returned in his favor, since he must establish, by a fair preponderance of the evidence, all of the facts essential to his cause of action or defense. A defendant, for this reason, usually, but not always, by any means, can more safely ask such an instruction than can the plaintiff; for one fact may be enough to destroy the cause of action, while many facts may be necessary to establish it.

Where the court is asked to instruct the jury to return a verdict in favor of the party making the request, and the request is denied, harm is very likely to result; for the jury are apt to conclude that the opinion of the court is strongly against the moving party. It is, therefore, not prudent to make the request except in very clear cases. Where there is doubt, the safe course is to allow the case to go to the jury in the ordinary way.

A plaintiff may, at the proper time, voluntarily dismiss his case, or take what is called a voluntary nonsuit. It is always prudent

[10] The text is quoted in Fairs v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 1029, where the court held that the defendant was entitled to have a verdict directed.

to adopt this course where the case seems hopeless, and there is reason to believe that a second action can be made successful. In many of the states, however, the dismissal will not carry out of court a counterclaim or a set-off. Where there is a defense that is not disposed of by a dismissal, it is exceedingly hazardous to dismiss, for the whole question may be litigated upon the answer or plea; and if it is, the judgment is conclusive, barring all further litigations upon the matters concluded by the judgment. It is, as a general rule, the right of the plaintiff, where there is no counterclaim or set-off, to dismiss any part of his cause of action, except, of course, in cases where it is indivisible.

RULES OF LAW.

The Demurrer to the Evidence.

1. When one party has given all the evidence he has in support of his cause, and rested, the other may, if he is confident that such evidence is insufficient to make a case against him, demur to it, and thus test its legal sufficiency.

Stephen's Pl., *90; 3 Bouv. Inst., § 3238; Pharr v. Bachelor, 3 Ala. 237; Trout v. Virginia &c. R. Co., 23 Gratt. (Va.) 619; Copeland v. Northeastern Ins. Co., 22 Pick. (Mass.) 135; Gould's Pl., *479, § 47; Crowe v. People, 92 Ill. 231; 2 Elliott's Gen. Pr., §§ 855, 856. See also, Holmes v. Royal Fraternal Union, 222 Mo. 556, 121 S. W. 100, 26 L. R. A. (N. S.) 1080.

This proceeding takes the case from the jury, waives all questions of fact, and submits it as a matter of law to be decided by the court. Co. Litt., 72; Bac. Ab. Pleas. N., 7; Fowle v. Com. Counc. of Alexandria, 11 Wheat (U. S.) 320, 6 L. ed. 484.

This practice does not obtain in every state, and has been held to be a matter in the discretion of the trial court. In State v. Soper, 16 Me. 293, 33 Am. Dec. 665, it is said: "A demurrer to the evidence is an unusual and antiquated practice, calculated to suppress truth and justice, and is allowed or denied by the court in the exercise of a sound discretion." See also, Gibson and Johnson v. Hunter, 2 H. Bl. 187; Young v. Black, 7 Cranch (U. S.) 565, 3 L. ed. 440; Abb. Law Dict., Tit., Demurrer to Evidence; Colegrove v. New York &c. R. Co., 20 N. Y. 492.

2. The demurrer must be to the whole of the evidence adduced by the opposite party, and not to any particular part.

3 Bouv. Inst., § 3241; Proprietary v. Ralston, I Dall. (U. S.) 18, 1 L. ed. 18; Gould's Pl., *481, § 52.

3. The demurrer admits, not only the existence of the evidence demurred to, but also the facts proved by it, including such facts as the jury might have reasonably inferred therefrom.

Davis v. Steiner, 14 Pa. St. 275, 53 Am. Dec. 547; Mackinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; Christie v. Barnes, 33 Kan. 317, 6 Pac. 599; Palmer v. Chicago &c. R. Co., 112 Ind. 250, 14 N. E. 70; Plotner v. Chillson, 21 Okla. 224, 95 Pac. 775, 129 Am. St. 776.

4. Upon a demurrer to the evidence, no evidence tending to contradict that demurred to can be considered.

Davis v. Steiner, 14 Pa. St. 275, 53 Am. Dec. 547; Ruff v. Ruff, 85 Ind. 431; McLean v. Equitable Life Assurance Society, 100 Ind. 127, 50 Am. 779, and authorities there cited. See also, Young v. Black, 7 Cranch (U. S.) 565, 3 L. ed. 340.

5. The demurrer waives all objections to the admissibility of the evidence made by the party who demurs.

Miller, Trustee, v. Porter, 71 Ind. 521; Hartman v. Cincinnati &c. R. Co., 4 Ind. App. 370, 30 N. E. 930.

But one party cannot deprive the other of his exceptions to the admission of evidence by demurring. Washburn v. Board, 104 Ind. 321, 3 N. E. 757, 54 Am. Rep. 332.

6. Final judgment should be entered upon a demurrer to the evidence, for plaintiff or defendant, according as the demurrer is overruled or sustained.

Obaugh v. Finn, 4 Ark. 110, 37 Am. Dec. 773; Gould's Pl., *479, § 47; Golden v. Knowles, 120 Mass. 336.

But where the damages are unliquidated the jury may either be required to assess the damages provisionally before the ruling on the demurrer, or a writ of inquiry may be awarded, if the demurrer is overruled, and another jury impaneled to assess the dam-

ages. 3 Bouv. Inst., § 3246; Obaugh v. Finn, *supra;* Gould's Pl., *491, § 73. See also, McCreary v. Fiske, 2 Blackf. (Ind.) 374.

7. A party, by demurring to the evidence, does not waive his right to test the sufficiency of a pleading, or take advantage of any defect therein on motion in arrest of judgment.

Bish v. Van Cannon, 94 Ind. 263; Cort v. Birkbeck, 1 Doug. (Mich.) 218; United States Bank v. Smith, 11 Wheat. (U. S.), 171, 6 L. ed. 443; Gould's Pl., *490, § 70.

Nor, it seems, is the right to test the sufficiency of the pleadings in any proper way, on appeal, waived thereby. McLean v. Equitable Life Assurance Society, 100 Ind. 127; United States Bank v. Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443.

But the demurrer itself does not test the sufficiency of the pleadings. Gould's Pl., 489, § 69; Lindley v. Kelley, 42 Ind. 294.

Compulsory Nonsuit.

1. It has been held that a statute authorizing the granting of a compulsory nonsuit on the defendant's motion, in civil cases, where the plaintiff rests without having made a *prima facie* case, is constitutional, and the practice is followed in many of the states.

Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468. And see note to French v. Smith, 24 Am. Dec. 622, where many authorities are cited.

2. The rule generally adopted, although there is some conflict in the authorities, is that, if the evidence given by the plaintiff would not authorize the jury to find a verdict for him, or if the court would set it aside if found, as contrary to the evidence, a nonsuit should be granted on defendant's motion.

Stuart v. Simpson, 1 Wend. (N. Y.) 376; Mateer v. Brown, 1 Cal. 221; White v. Bradley, 66 Me. 257; Aycrigg's Ex'rs v. New York &c. R. Co., 30 N. J. L. 460; Hoeflinger v. Stafford, 38 Wis. 391; Brown v. Massachusetts Life Ins. Co., 59 N. H. 298, 13 Ins. L. J., 208. See generally 23 Cyc. 774; 6 Ency. of Pl. & Pr., 823.

But where the evidence, "viewed in its most favorable light," would

warrant a jury in finding for the plaintiff, a non-suit should not be granted. Thompson v. Lumley, 50 How. (N. Y.) 106, 64 N. Y. 631.

3. Where the plaintiff makes a case sufficient to go to the jury, or where the facts are controverted, a motion for nonsuit should be denied.

Lehman v. Kellerman, 65 Pa. St. 489; Central R. Co. v. Moore, 24 N. J. L. 830.

Some authorities hold that, if there is a mere scintilla of evidence, a nonsuit should not be granted. Robinson v. Louisville R. R. Co., 2 Lea (Tenn.) 594; Smith v. Gillett, 50 Ill. 290.

But the weight of both reason and authority is in favor of the rule as we have stated it above, for it is absurd to submit a cause to the jury where there can be but one verdict that the court will allow to stand. See Commissioners v. Clark, 94 U. S. 278-284, 24 L. ed. 59; Cormnan v. E. C. R. Co., 4 H. & N. 781; Raby v. Cell, 85 Pa. St. 80.

4. A motion for nonsuit cannot be made before the plaintiff has closed his case;[1] but it seems that it may be made either immediately thereafter, or after all the evidence is in.[2]

[1] Walker v. Supple, 54 Ga. 178. And see Miller v. House, 63 Iowa 82, 18 N. W. 708.

[2] Brown v. Massachusetts Life Ins. Co., 59 N. H. 298; Thompson's Charging Jury, § 32.

Where, however, the defendant has introduced evidence of his own, it seems that a motion for a nonsuit will not lie until plaintiff has had an opportunity to rebut. Metzger v. Herman, 12 N. Y. Weekly Dig., 181; Jones v. Weathersbee, 4 Strobh. (S. Car.) 50.

And it is even held that the trial court may, in its discretion, permit the plaintiff to introduce further evidence after a motion for a nonsuit has been made. Abbey Homestead Assn. v. Willard, 48 Cal. 618.

5. The motion for nonsuit should specify the grounds on which it is asked, and point out the particulars in which the plaintiff has failed to make his case.

Binsee v. Wood, 37 N. Y. 526; Gardiner v. Schmaelzle, 47 Cal. 588; Silva v. Holland (Cal.), 16 Pac. 385.

6. Upon motion for nonsuit, as in case of a demurrer to the

evidence, the opposite party is entitled to have his evidence considered as absolutely true, and to have the benefit of all legitimate inferences therefrom.

Maynes v. Atwater, 88 Pa. St. 496; Frost v. Gibson, 59 Ga. 600; Cook v. New York R. Co., 1 Abb. Ct. App. Dec. 432. See also, Kirwan v. American Lithographic Co., 197 N. Y. 413, 90 N. E. 945, 27 L. R. A. (N. S.) 972.

Taking the Case From the Jury by Instructions.

1. Where there is no dispute as to the facts, and no controversy as to the inferences that can be legitimately drawn from them, the question is one of law, and the jury may be directed to return a verdict for plaintiff or defendant, according as either is entitled to recover under the law applicable to the case.

Purcell v. English, 86 Ind. 34, 44 Am. 255; Thomp. Charging Jury, 23; Toomey v. London &c. R. Co., 3 C. B. (N. S.) 146; City Council of Montgomery v. Wright, 72 Ala. 411, 5 Am. and Eng. Corp. Cas., 642; Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 637, 19 L. ed. 1008; La Rue v. Lee, 63 W. Va. 388, 60 S. E. 388, 129 Am. St. 978; Cockrell v. Schmitt, 20 Okla. 207, 94 Pac. 521, 129 Am. St. 737.

2. It is error for the court to refuse to direct a verdict in a proper case.

Retzger v. Wood, 109 U. S. 185, 27 L. ed. 900, 3 Sup. Ct. 164; Hauks v. Roberts, 3 J. J. Marsh. (Ky.) 298; Tully v. Fitchburg R. Co., 134 Mass. 499; Morgan v. Durfee, 69 Mo. 469, 9 Cent. L. J. 12; Crookshank v. Kellog, 8 Blackf. (Ind.) 256; 2 Elliott's Gen. Pr., § 887. Exception should be taken and the ruling assigned as ground for new trial in Indiana. Bane v. Keefer, 152 Ind. 544, 53 N. E. 834.

3. A plaintiff, as well as a defendant, may take advantage of this practice in a proper case;[1] but no motion by a plaintiff to direct a verdict in his favor will lie until after the defendant's case is closed.[2]

[1] Anderson County Comrs. v. Beal, 113 U. S. 227-241, 28 L. ed. 966, 5 Sup. Ct. 433; Bemis v. Woodworth, 49 Iowa 340; People v. Cook, 8 N. Y. 67; Cockrell v. Schmitt, 20 Okla. 207, 94 Pac. 521, 129 Am. St. 737; Irwin v. Dole, 7 Kan. App. 84, 52 Pac. 916; Anthony v. Wheeler, 130 Ill. 128, 2 N. E. 494, 17 Am. St. 281.

[2] Kingsford v. Hood, 105 Mass. 495. In most jurisdictions the defendant may make the request or motion either at the close of the plaintiff's evidence or at the close of all the evidence, but if he makes it at the close of the plaintiff's evidence and then introduces evidence himself he will generally be deemed to have waived it and can raise the question only by renewing his motion at the close of all the evidence. 2 Elliott's Gen. Pr., § 888, and numerous cases there cited; also note in 14 Ann. Cas. 218, 222. As to the effect of both parties asking for a peremptory instruction, see Empire State Cattle Co. v. Atchison &c. Ry. Co., 210 U. S. 1, 28 Sup. Ct. 607, 609; Charlotte Nat. Bank v. Southern Ry. Co., 179 Fed. 769; note in 77 C. C. A. 8, and note in 6 Ann. Cas. 544, 545.

4. The test for determining when a case should be taken from the jury is substantially the same as upon motion for nonsuit; and the general rule is often stated that where a verdict, if against the party seeking to have the case taken from the jury, would have to be set aside as contrary to the law and the evidence, a verdict in his favor should be directed, upon proper application.[1] Or, in other words, a verdict should be directed, on proper request, when there is no conflict in the evidence and but one reasonable inference can be drawn therefrom, so that under the law the party making the request is entitled to a verdict.[2]

[1] Bagley v. Cleveland Rolling-Mill Co., 21 Fed. 159; Pleasants v. Fant, 22 Wall. (U. S.) 116, 22 L. ed. 780; Cagger v. Lansing, 64 N. Y. 417, opin. 427; Dryden v. Britton, 19 Wis. 31; Weis v. City of Madison, 75 Ind. 241, 39 Am. 135; Hyatt v. Johnson, 91 Pa. St. 196; Proffatt's Jury Tr., § 354; Baldwin v. Shannon, 43 N. J. L. 596. See also Rush v. Coal Bluff Mining Co., 131 Ind. 135, 138, 30 N. E. 904 (quoting from rule 2, *ante*, page 540); Oleson v. Lake Shore &c. R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149 (citing text); Delaware &c. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. 560; 23 Am. & Eng. Ency. of Law, 561; 6 Ency. of Pl. & Pr., 678. But see McDonald v. Metropolitan St. Ry. Co., 167 N. Y. 66, 60 N. E. 282, criticizing the statement of the rule in this form. Compare also, Haughton v. Ætna Life Ins. Co., 165 Ind. 32, 40-42, 73 N. E. 592, 74 N. E. 613.

[3] In addition to authorities already cited, see McGuire v. Blount, 199 U. S. 142, 50 L. ed. 125, 26 Sup. Ct. 1, 4; Board v. Chipps, 131 Ind. 56, 29 N. E. 1066; People v. People's Ins. Exch., 126 Ill. 466, 18 N. E. 774, 2 L. R. A. 340, and note; 2 Am. & Eng. Ency. of Law (2d ed.), 558; 2 Elliott's Gen. Pr., §§ 887, 889.

Thus, even in cases of negligence, which is usually a mixed question of law and fact, this rule has often been applied. Purcell v. English, 86 Ind. 34, 44 Am. 255; Wombough v. Cooper, 2 Hun (N. Y.) 428; Fouhy v. Pennsylvania R. Co. (Pa.), 2 Atl. 536; numerous cases cited in 3 & 4 Elliott on Railroads (2d ed.), §§ 1179, 1702, and 2 Elliott on Roads and Streets (3d ed.), §§ 1041, 1043. So, in cases of contributory negligence, the jury may be directed to return a verdict against the plaintiff. Allyn v. Boston &c. R. Co., 105 Mass. 77.

The rule has also been applied where a contract sued on is void on its face because of the statute of frauds. Rigby v. Norwood, 34 Ala. 129.

So where the sole question was on the construction of documentary evidence, without dispute as to any of the facts. Thorp v. Craig, 10 Iowa 461.

So in a suit on a promissory note, where nothing was to be done but to calculate the amount of principal and interest. Potter v. Wooster, 10 Iowa 334.

And where issues are joined upon a sworn plea of *non est factum*, and no evidence is given to prove the execution of the instrument, a verdict for the defendant may be directed. Kerley v. West, 3 Litt. (Ky.) 362.

5. Where, however, more than one reasonable inference might be drawn by the jury from the evidence, so that different minds would reach different results, the case should not be taken from the jury.

Luke v. Calhoun Co., 52 Ala. 115; Johnson v. Missouri Pac. R. R. Co., 18 Neb. 690, 26 N. W. 347; Arnd v. Aylesworth (Iowa), 123 N. W. 1000, 29 L. R. A. (N. S.) 638; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. 140; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210.

On this ground courts have often refused to direct a verdict in particular instances, especially in cases involving the question of negligence and contributory negligence. Lincoln v. Gillilan, 18 Neb. 114, 24 N. W. 444, and authorities cited in note, 447; Mynning v. Detroit &c. R. Co., 64 Mich. 93, 26 N. W. 514; Indianapolis St. R. Co. v. Kane, 169 Ind. 25, 80 N. E. 841; O'Malley v. Missouri Pac. Ry. Co., 113 Mo. 319, 20 S. W. 1079; Pullman Palace Car Co. v. Laack, 143

Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Kansas City &c. R. Co. v. Kirksey, 60 Fed. 999, 1002, 9 C. C. A. 321; Carter v. Oliver Oil Co., 34 S. Car. 211, 27 Am. St. 815; and cases cited and reviewed in 2 Elliott on Roads and Streets (3d ed.), § 1042.

Dismissal, or Voluntary Nonsuit.

1. Where a party finds that his evidence is not strong enough to make a case, and wishes to save the right to bring another action at some future time under more favorable auspices, he may, before it is too late, dismiss his action without prejudice, or submit to a voluntary nonsuit, as it is often called.

3 Blk. Comm., *376; Wooster v. Burr, 2 Wend. (N. Y.) 295; 3 Bouv. Inst., § 3309; Dunning v. Galloway, 47 Ind. 182; Wooster v. Burr, 2 Wend. (N. Y.) 295; *In re* Butler, 101 N. Y. 367; Glascock v. Brandon, 35 W. Va. 84, 12 S. E. 1102.

In Massachusetts and New Hampshire, this cannot be done as a matter of right after the trial has fairly begun, but may be permitted by the court in the exercise of a sound discretion. Truro v. Atkins, 122 Mass. 418; Fulford v. Converse, 54 N. H. 543. See also, Washburn v. Allen, 77 Me. 344; Johnson v. Bailey, 59 Fed. 670.

Nor will a voluntary nonsuit of the entire case be allowed against objection where the defendant has filed a cross-complaint asking for affirmative relief. Merchants' Bank v. Schulenberg, 48 Mich. 102, 19 N. W. 741; Tabor v. Mecklsee, 58 Ind. 290; McLeod v. Bertschy, 33 Wis. 176, 14 Am. 755.

2. At common law, and in several of our states, the plaintiff may voluntarily submit to a nonsuit at any time before the jury have rendered their verdict;[1] but in other states it must be done, according to statute, before the jury retire, if not even sooner.[2]

[1] Merchants' Bank v. Rawls, 7 Ga. 191, 50 Am. Dec. 394; Peebles v. Root, 48 Ga. 592; Bell v. Gardner, 77 Ill. 319; Graham v. Tate, 77 N. Car. 120. See also, 6 Ency. of Pl. & Pr., 836-839.

[2] McClelland v. Louisville &c. R. Co., 94 Ind. 276; Blackburn v. Minter, 22 Ala. 613; National Broadway Bank v. Leslie, 31 Fla. 76, 12 So. 525; Harris v. Beam, 46 Iowa 118; Schafer v. Weaver, 20 Kan. 294; Fink v. Bruihl, 47 Mo. 173; Frois v. Mayfield, 31 Tex. 366. See also, 6 Ency. Pl. & Pr. 839; 14 Cyc. 401.

3. In some jurisdictions, it is the practice for the court, in case of surprise, or for any other cause which would render further progress of the trial unjust and unfair to a party, to permit a juror to be withdrawn, and thus postpone the trial.

Messenger v. Fourth Nat. Bank, 6 Daly (N. Y.) 190, 48 How. Pr. (N. Y.) 542; Dillon v. Cockcroft, 90 N. Y. 649; 2 Tidd's Pr. (2d Am. ed.), 909; note in 48 L. R. A. 432. See also, Wabash R. Co. v. McCormick, 23 Ind. App. 258, 55 N. E. 251.

The plaintiff was permitted to do this, in a recent case, even after the defendant, at the close of plaintiff's evidence, had moved the court to direct a verdict in his favor. Wolcott v. Studebaker, 34 Fed. 8.

CHAPTER XVIII.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

"They shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."

Practical Suggestions.

Success in the trial court is the object to be attained in every case, if possible, and he who prepares with a view wholly to success on appeal is very unwise; but he who neglects to reserve questions for appeal is not much wiser than he who looks only to the appellate court for success. The primary object always is—the verdict. There is, however, no reason why one may not stoutly struggle for the verdict, and yet at the same time take measures that may make an appeal availing in case of defeat.

There is no necessity for permitting measures taken with a view to an appeal to prejudice the jury, but the advocate may so conduct his case in this respect as to do serious injury to his client's cause in the minds of the jurors. If objections and exceptions are frequently made, and are taken in such a manner as to make it appear that there is no hope except from an appeal, harm is very likely to result. The way to prevent this result is to make as little parade or show as possible in stating objections and reserving exceptions. In general, the true policy is to calmly present the objections; there are, however, as we have suggested at another place, some cases where it is better to make the objections persistently and forcibly. In ordinary cases, the counsel must keep his temper, and not permit the jurors to perceive that he has been nettled or disturbed by an adverse ruling. But, while the manner should be subdued and deliberate, the objections should be stated, and the statement should go into the record. In

no event should there be a surrender of the right to state objections and to have exceptions noted. This right no court can justly deny, and no counsel who has the courage that it is necessary that advocates should have will permit a denial of this right.

In order that an adverse ruling, made during the progress of the trial, may be available on appeal, four things are ordinarily essential. First. That there should be a timely objection, sufficient in form and substance. Second. That there should be an exception stated at the proper time, and in the proper manner. Third. That there should be a proper motion calling up for review the adverse ruling. Fourth. That the record should show the objection, the exception, and the motion calling it in review. The objection, of course, precedes the ruling; the exception must be taken at the time the ruling is announced, the motion calling it in review must be the appropriate one and made at the proper time, and the ruling must be put in writing in due form, and incorporated in the record.

It is well to object and except to every material adverse ruling in all cases that are at all doubtful. Without a proper objection and exception there is no hope for relief on review or appeal. General exceptions are all that need be stated when an ordinary motion, as for a new trial, or the like, is overruled. All that need be done in such a case is to state in general terms that an exception is reserved, and see that it is properly entered of record. Motions, of whatever character, should specifically state the grounds upon which they are based. This may not always be required as a rule of law, but it is the safest course to follow. It is always safe to make motions that relate to proceedings on the trial specific, and this is done by addressing them to the particular point or matter and assigning the reasons on which they are founded. In every case where there is doubt the true rule is to state objections specifically, no matter in what form the question arises.[1]

It is necessary, as a general rule, where a ruling is made dur-

[1] See City of New Albany v. White, 106 Ind. 206; Hablichtel v. Yambert, 75 Iowa 539, 39 N. W. 877; Fischer v. Coons, 26 Neb. 400, 42 N. W. 417; Barney v. Hartford, 73 Wis. 95, 40 N. W. 581.

ing the trial, that an exception should be taken at the time the ruling is made, and that another exception should be taken when the motion calling the ruling in review is acted on by the court. Thus, suppose the court to admit in evidence, over the defendant's objection, a deed, and that a motion for a new trial is subsequently made. In such a case two distinct exceptions are necessary, one at the time the ruling is made admitting the evidence, another at the time the motion for a new trial is denied. Presumptions are made in favor of the trial court, and he who assails its rulings must show a wrong ruling, due objection and exception, a proper motion calling the rulings in review, and an exception to the ruling on the motion.

It is not usual to reduce to writing objections made during the trial, nor to note at the time the exceptions in writing, but the objections must be stated, the exceptions reserved, and time obtained to put them in writing. It must appear, by the record, that the exception was taken at the time the ruling was made, but this may be made to appear in a bill of exceptions subsequently filed. It is sometimes prudent to take a bill of exceptions at the time the ruling was made, but, as a general rule, all that need be done at that time is to ask leave to reduce the exception to writing, and pray time for filing the bill. We are speaking now, be it remembered, of rulings made while the trial is in progress, for where rulings are made on the pleadings, or on motions for a *venire de novo,* a new trial, or the like, the exception must be taken at the time, and then entered of record in the order-book of the court.

A bill of exceptions is not necessary to exhibit matters which are properly a part of the record of the court. It is not necessary, for instance, where the ruling is upon a demurrer to a pleading; but wherever it is necessary to bring papers, motions, or the like, into the record, when they are not part of the pleadings, it is safest to take a bill of exceptions. It is essential, in most jurisdictions, that evidence, and affidavits in support of a motion for a continuance, or for a new trial, should be incorporated in a bill of exceptions; otherwise, they will not, in ordinary cases, be con-

sidered on appeal. The safe rule is to bring all affidavits filed in support of motions into the record by a bill of exceptions.

The usual formal commencement of a bill of exceptions is this: "Be it remembered." This recital is followed by a statement of the proceedings of the court. The signature of the judge should be affixed at the close of the bill. In strictness, all evidence, documentary and oral, should be written at full length in the bill in all cases where it is necessary that all the evidence should be exhibited; but this rule has been relaxed in some of the states, and documents may be brought into the record by referring to them and writing the words "here insert." The statute must be strictly followed. It is not safe to attach papers to a bill as exhibits; they should be incorporated into the bill in such a manner as to precede the signature of the judge.

There are matters which must appear in the record proper, and these matters cannot be properly exhibited in the bill of exceptions. What is strictly a part of the record should, as a general rule, appear in the order-book or docket. Where time is given to file a bill of exceptions, it should be shown by an entry in the order-book or docket, and there should be noted the time the bill is filed.

RULES OF LAW.

1. Where a ruling or an instruction of the trial court is objected to, or deemed erroneous, an exception should be taken at the time.

Fager v. State, 22 Neb. 332, 35 N. W. 195; Coan v. Grimes, 63 Ind. 21; Newlon v. Tighner, 128 Ind. 466, 27 N. E. 168; Gridley v. College &c., 137 N. Y. 327, 33 N. E. 321; Clark v. Hodges, 65 Vt. 273, 26 Atl. 726; Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011, 13 Sup. Ct. 136; Hughes v. Robertson, 1 T. B. Mon. (Ky.) 215, 15 Am. Dec. 104.

2. An exception ought, in strictness, to be noted at the time it is taken; but the court may have it noted thereafter, if done before the verdict is received, or within the time specially granted by the court by an order made when the exception is stated.

Stewart v. Huntington Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628; Goodwin v. Smith, 72 Ind. 113; Hughes v. Robertson, 1 T. B. Mon. (Ky.) 215, 15 Am. Dec. 104.

3. Notification by counsel that he reserves the right to except subsequently is not, in itself, a good exception.

Gregory v. Dodge, 14 Wend. (N. Y.) 593. See also, Kleinschmidt v. McAndrews, 117 U. S. 282, 29 L. ed. 905, 6 Sup. Ct. 761.

But an agreement by counsel, assented to by the court, or a direction of the court, without objection, that the stenographer should enter an exception wherever any ruling is objected to, entitles counsel to have such exceptions inserted on the settlement of the case. Briggs v. Waldron, 83 N. Y. 582; Stephens v. Reynolds, 6 N. Y. 454.

4. Exceptions should be distinct and specific.

Dwyer v. Fuller, 144 Mass. 420, 11 N. E. 686; *Ex parte* Crane, 5 Pet. (U. S.) 190, 8 L. ed. 92; Waters v. Gilbert, 2 Cush. (Mass.) 27; Leyner v. State, 8 Ind. 490; Corey v. Rhinehart, 7 Ind. 290.

Thus, an exception to an entire charge will be unavailing unless it is wholly erroneous. Milwaukee &c. R. Co. v. Hunter, 11 Wis. 160, 78 Am. Dec. 699; Garrigus v. Burnett, 9 Ind. 528; Cooper v. Schlesinger, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. 360.

5. A mere objection, without an exception, to the ruling or action of the court is insufficient to save the question for appeal.

Railsback v. Greve, 58 Ind. 72; Gillooley v. State, 58 Ind. 182; McGarvey v. Roods, 73 Iowa 363, 35 N. W. 488, 26 Cent. L. J., 184.

6. The right to a bill of exceptions was given by the statute of Westminster, 2, 13 Edw. 1, Ch. 31, which provides that, "when one impleaded before any of the justices alleges an exception, praying they will allow it, and if they will not, if he that alleges the exception writes the same, and requires that the justices will put their seals, the justices shall do so, and if one will not, another shall." This has been adopted substantially, it is said, either by express enactment or common practice in all the states of the union.

Conrow v. Stroud (Pa.), 6 Am. L. Reg. 298, 301; 3 Bouv. Inst., 473,

§ 3232; Endicott v. Petitioner, 24 Pick. (Mass.) 339. State statutes do not govern in the federal courts. Van Stone v. Manufacturing Co., 142 U. S. 128, 35 L. ed. 961, 12 Sup. Ct. 181.

7. The object of a bill of exceptions is to present and get of record all exceptions and matters for review not otherwise appearing of record. It is in form a written statement of such exceptions and matters, signed and sealed by the judge in confirmation of its correctness.

Galvin v. State, 56 Ind. 51; Morrow v. Sullender, 4 Neb. 375. See also. Young v. Martin, 8 Wall. (U. S.) 354, 357, 19 L. Ed. 418; Brown v. State, 29 Fla. 543, 10 So. 736.

8. Although exceptions should be taken, and, as a rule, noted, at the time of the ruling complained of, it is not practicable for the court to delay the trial until they can be reduced to writing in the shape of a formal bill, and it is, therefore, the general practice for the court to grant time for that purpose, so that bills of exception are ordinarily settled and signed after the trial.

Stewart v. Huntington Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628; Hughes v. Robertson, 1 T. B. Mon. (Ky.) 215, 15 Am. Dec. 104; Goodwin v. Smith, 72 Ind. 113; First Nat. Bank v. Bartlett, 8 Neb. 319.

Unless otherwise provided by statute, it may usually be tendered and allowed at any proper time during the term. 2 Elliott's Gen. Pr., § 1079.

9. The time to be given, unless governed by statutory provision, is within the sound discretion of the trial court,[1] but it should be definite and reasonable.[2]

[1] Merrick v. State, 63 Ind. 327.

[2] Lansing v. Coats, 18 Ind. 166.

10. A bill of exceptions cannot be settled and signed in vacation, after the expiration of the term and of the time allowed therefor.

Hake v. Strubel, 121 Ill. 321, 12 N. E. 676; Vanness v. Bradley, 29 Ind.

388. See also, Marshall v. State, 123 Ind. 128, 23 N. E. 1141; Mayor &c. Westminster v. Shipley, 68 Md. 610, 13 Atl. 365; State v. Scott, 113 Mo. 559, 20 S. W. 1076. But see People v. Raschke, 73 Cal. 378, 15 Pac. 13.

11. Where it is not signed and filed, or presented to be signed, in time, it will be struck from the record, or, at least, will not be considered as a part thereof on appeal.

Jennison v. Boos, 4 Gild. (N. Mex.) 71, 13 Pac. 230; Markland v. Albes, 81 Ala. 433, 2 So. 123; Joseph v. Mather, 110 Ind. 114, 10 N. E. 78.

And the trial judge may properly refuse to sign it. Wade v. Bryant, 9 Ky. L. 875, 7 S. W. 397.

12. Where the bill shows on its face that it could not have been presented and signed within the time allowed, it will not be considered as a part of the record, although it contains the general statement that it was presented in time.

Orton v. Tilden, 110 Ind. 131, 10 N. E. 936.

It has been held, however, that where the court reporter is unable to prepare the bill within the time limited, the fault not being that of the plaintiff in error, the bill should nevertheless be signed and considered as part of the record. Richards v. State, 22 Neb. 145, 34 N. W. 346.

13. Where a judge refuses to sign or seal a bill of exceptions, he may be compelled to do so, in a proper case, by mandamus.

Ex parte Crane, 5 Pet. (U. S.) 190, 8 L. Ed. 92; Jelley v. Roberts, 50 Ind. 1; People v. Judges, 1 Caines (N. Y.) 511; Dillard v. Dunlap (W. Va.), 3 S. E. 383. But see Drexel v. Man, 6 Watts & Serg. (Pa.), 386, 40 Am. Dec. 573.

If the bill is true, the judge must sign it, regardless of what he may think as to the materiality of its contents. Poteet v. County of Cabell, 130 W. Va. 58, 3 S. E. 97.

If the bill is false, he should make a return to that effect. See People v. Pearson, 2 Scam. (Ill.) 189, 33 Am. Dec. 445. The prevailing rule is that he may be compelled to act, but not, ordinarily, directed as to just what shall be put in the bill. See generally, Elliott's App. Proc., § 516; 2 Elliott's Gen. Pr., § 1087.

14. All matters for review, not required to be of record, should be embodied in a bill of exceptions.

State v. Carr, 37 Kan. 421, 15 Pac. 603; Hall v. Durham, 109 Ind. 434, 9 N. E. 926; York &c. R. Co. v. Myers, 18 How. (U. S.) 246, 251, 15 L. ed. 380; 2 Elliott's Gen. Pr., §§ 1058-1078.

15. All the facts on which an exception is based must be shown, or, in other words, enough must appear to show not only the ruling and exception but also to enable the court to judge whether there is available error.

Kelly v. Murphy, 72 Cal. 560, 12 Pac. 467; Vass v. Commonwealth, 3 Leigh (Va.) 786, 24 Am. Dec. 695; Phœnix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500; Hennessy v. State, 23 Tex. App. 340, 5 S. W. 215; 2 Elliott's Gen. Pr., §§ 1058, 1070. See also, Estate of Page, 57 Cal. 238, 239; Louisville &c. R. Co. v. Worley, 107 Ind. 320, 7 N. E. 215; Berlin v. Oglesbee, 65 Ind. 308; Hooper v. State, 29 Tex. App. 614, 16 S. W. 655.

Mere memoranda not setting forth sufficient to explain the ruling and ground of exception will not suffice. State v. Clement, 15 Ore. 237, 14 Pac. 410.

Thus, where an exception is taken to the exclusion of evidence, the bill must disclose its relevancy and materiality. Buchanan v. State, 24 Tex. App. 195, 5 S. W. 847; Johnson v. Jennings, 10 Gratt. (Va.) 1, 60 Am. Dec. 323, and note, 330.

So, where an instruction is excepted to, the bill must contain sufficient matter to show its inapplicability, or other error in giving it. Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Brewer v. Strong, 10 Ala. 961, 44 Am. Dec. 514.

16. No right to a bill of exceptions in a criminal case existed at common law, but it is now given by statute in most of the states.

Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216, and note, 238; 3 Bouv. Inst., 474, § 3232. See also, 3 Whart. Cr. L., § 3050; 1 Bish. Cr. L., § 840.

CHAPTER XIX.

PROCEEDINGS AFTER VERDICT.

"But the wise man reserves something for hereafter."—*Proverbs.*

Practical Suggestions.

The appropriate motion on the part of the successful party, who is content with the verdict, is for judgment. In order to entitle him to judgment the verdict must be sufficient in form and substance to support a judgment in his favor, for the general rule is that the judgment follows the verdict. It is, therefore, essential that the verdict be such as the law requires. The law requires that the verdict should respond to the issues, and should be certain. In some cases a verdict must be specific upon some of the points involved in the controversy, but, ordinarily, a verdict in form such as this: "We, the jury, find for the plaintiff, and assess his damages at ——— dollars;" or, "We, the jury, find for the defendant," is sufficient.

Where a party desires to exclude a finding upon some point it is better to take a special verdict, for if this be not done there is danger that the judgment which follows may be conclusive upon all the points that might have been litigated under the issues. Where there is reason to fear this result, then he who desires to avoid it should always so frame his verdict as to exclude the points he desires to have remain open for future litigation. It is, of course, not every case where an adjudication upon any of the points which the case involves can be avoided, nor, indeed, is it often that a material point can be excluded from the operation of the judgment, but still there are cases in which this can be accomplished. Where the case is a peculiar one, or where it is de-

sired to prevent a complete and final adjudication upon all questions, counsel should prepare the form of the verdict, and seasonably request the court to submit it to the jury.

It is not necessary that the motion for judgment should be in writing except where the verdict is a peculiar one, or where the successful party desires an unusual judgment. Where a judgment different from that commonly rendered is desired, the successful party should put his motion in writing, and specifically designate the relief he prays. If the court overrules such a motion, it is safest to tender a bill of exceptions.

Where a party is aggrieved by the form of the judgment entered he should at once move to modify it, specify in writing in what particulars he desires it modified, and, if the motion is denied, bring it into the record by a bill of exceptions duly signed by the judge.[1] It is a good general rule for a party who deems a judgment erroneous in its tenor and form to move to modify or change it, and reserve the question in the mode indicated. It is, we may as well say here as elsewhere, of great importance to present every question that it is proposed to make available on appeal clearly and definitely to the trial court, and the safe way to do this is to put in writing the motion which presents the question. The theory upon which the appellate courts usually proceed is, that no question will be considered on appeal which was not fairly and legitimately presented to the trial court for review.[2] The general rule—and it has very few exceptions—is that the question must be presented in the mode prescribed by law, or it will receive no consideration on appeal. The reason for this rule, often given, is, that the trial court must be allowed an opportunity to correct its own errors before the appellate court will review them.

The motion most often interposed by the unsuccessful party is for a new trial. "The law presumes a verdict to be correct. Hence, on a motion for a new trial, the party must set forth the

[1] See Migatz v. Stieglitz, 166 Ind. 361, 365, 77 N. E. 400; Martin v. Martin, 74 Ind. 207; Elliott's App. Proc., §§ 345, 346.

[2] See Elliott's App. Proc., §§ 344, 827, 828.

grounds upon which he intends to rely, or the objections will be considered as waived."[3] The motion should be in writing, and should specify, with reasonable certainty, all the rulings deemed erroneous. It is to be kept in mind that it is the objections specified in the motion, and those only, that are brought up for review; for all others properly arising on a motion for a new trial are deemed to be waived.[4] It is on the motion as it is written that the appellate court acts; for, as to objections not properly presented, the presumption is in favor of the regularity and legality of the rulings of the trial court.

"It is the business of the party who takes exceptions to show that the decision is wrong. It is not enough that he succeeds in mystifying it by adopting language which subjects the judge to the suspicion that he did not understand the safest ground on which to place it."[5] In order to show that rulings are wrong, it must appear that they were probably injurious to the party who makes complaint, since a mere harmless error will not warrant a reversal. Nor will it be sufficient to point out a material error on appeal, unless the record affirmatively shows that objection was properly reserved during the trial. For this reason, the motion must be so specific as to indicate, with reasonable certainty, the error of which the party complains. Where the error is in overruling, or in sustaining, a challenge to a juror, the name of the juror should be given. Where a document is improperly admitted, or is wrongly excluded, it should be identified in the motion. Where testimony is erroneously admitted, or is improperly excluded, the name of the witness should be stated, and the subject of the testimony briefly mentioned. Where instructions are improperly given, or are erroneously refused, they should be appropriately designated. Where the verdict is contrary to the evidence, or is not sustained by the evidence, or is contrary to

[3] Hilliard on New Trials (2d ed.), 21. See also, Racer v. Baker, 113 Ind. 177, 14 N. E. 241; Slate v. Nelson, 101 Mo. 477, 14 S. W. 718, 10 L. R. A. 39; Harrington v. Latta, 23 Neb. 84, 36 N. W. 364; 2 Elliott's Gen. Pr., § 987; Elliott's App. Proc., §§ 347-352.

[4] Beans v. Emanueli, 36 Cal. 117.

[5] Munro v. Potter, 34 Barb. (N. Y.) 360, 361.

law, it is, in general, sufficient to so state in general terms. Where there is misconduct of jurors, of parties, or of counsel, names should be given and the misconduct briefly described. Where the ground of the motion is newly discovered evidence, the motion should be verified, and the affidavit of the newly discovered witness should accompany the motion.

The evidence must, in most cases, be brought into the record, or no question on the ruling denying a new trial will be presented.[6] In all cases there must be enough in the record to affirmatively show error, and to properly inform the appellate court of its nature and effect.[7] In every case "enough must be stated to make the error appear affirmatively, or, in other words, to overcome the presumption in support of the action of the court below."[8]

The motion and incidental proceedings must substantially conform to the statute. If there is a material departure from the rule prescribed by statute, the motion will be unavailing.[9] It is not enough, however, to follow the language of the statute in all cases, for in many instances the motion must be much more specific than the statutory language would make it.[10] It is prudent to adopt as a general head the language of the statute, and under that head to state in due order, and with proper precision, the particular rulings deemed to be erroneous. This is the safe course; for no causes for a new trial are valid except such as the statute prescribes, and by adopting the course suggested there is, obviously, less danger of mistake than there would be if a different course were pursued.

Questions arising on the pleading are not saved by a motion

[6] Ballard v. Noaks, 2 Pike (Ark.) 45; Millet v. Hayford, 1 Wis. 401; Terry v. Robbins, 5 S. & M. (Miss.) 291.

[7] State v. Neford, 31 Conn. 40; Carter v. Beals, 44 N. H. 408; Baxter v. Abbott, 7 Gray (Mass.) 71; Thomas v. Lawson, 21 How. (U. S.) 339; Lothrop v. Wightman, 41 Pa. St. 304.

[8] Hynes on New Trials and Appeals, § 258, p. 777.

[9] Humphries v. Marshall, 12 Ind. 609.

[10] See Marley v. Noblett, 42 Ind. 85; Ohio &c. Co. v. Kuhn, 9 Ky. 467, 5 S. W. 419.

for a new trial. The proper mode of saving such questions is, as is evident from what we have said in another place, by noting of record an exception at the time the ruling is made. A motion for a new trial covers only such matters as concern the trial or occur during the trial. In assigning causes in support of the motion, it is, therefore, proper to assign only such causes as are connected with the trial, or as affect the mode and manner in which the trial has been conducted.

Where a motion for a new trial is made on the ground that the damages are excessive, or on the ground that there is an error in the amount of the recovery, and the successful party has reason to believe that the cause is well assigned, his best course is to enter a remittitur for the amount in excess of that justly recoverable. The motion for leave to enter a remittitur should be made promptly, in order to save costs.

We have given the character and incidents of the other motions which follow the verdict, in stating the rules of law, and we need add but little to what is there said. We need only say that care must be taken that the motions are seasonably made, that they are made in due order of time when more than one is interposed, and that they should be sufficiently specific to present the question sought to be brought before the court for review. It may, too, be well enough to direct attention to the fact that it is the practice of some cunning advocates, by artfully drawn motions and adroitly prepared entries, to secure advantages that a vigilant opponent would not permit them to gain. A practice of many lawyers is to permit a complaint to go unchallenged by demurrer, and, after verdict, to assail it by a motion in arrest of judgment. It is the part of prudence, therefore, for counsel not to assume that, because there is no demurrer, his pleading is unassailable; he should, on the contrary, carefully examine his pleading, and make sure that it is good. This he should do before it is too late to remedy defects by amendment. Of course, the wise lawyer will prepare his pleading with care in the first instance, and with no thought of amendment; but even the wisest of men often discover mistakes on a re-examination of their work. The

practice of delaying an attack upon the complaint until after verdict is attended with danger; for, in many instances, a complaint which would fall before a demurrer will repel a motion in arrest of judgment. Many defects are cured by the verdict.[11]

[11] Gould's Pleadings (5th ed.), 464; 2 Elliott's Gen. Pr., § 1039; Rushton v. Aspinwall, 2 Dougl. (Mich.) 679; Ohio &c. R. Co. v. Smith, 5 Ind. App. 560, 32 N. E. 809; Fox v. Spring Lake &c. Co., 89 Mich. 387, 50 N. W. 872; Rogers v. New York &c. R. Co., 134 N. Y. 197, 32 N. E. 27.

RULES OF LAW.

1. After verdict and termination of the trial proper, the unsuccessful party may move the court, 1, to grant a new trial; 2, to award a *venire facias de novo;* 3, to arrest the judgment, or to give judgment *non obstante veredicto;* 4, to award a repleader; or, 5, where special findings of fact are returned, to render judgment thereon, notwithstanding the general verdict.

Stephen on Pleading, *94; Smith on Actions at Law, *153; 3 Bouv. Inst., § 3272; 2 Elliott's Gen. Pr., § 984. It is not meant, however, that these motions must always come in the order named, nor that one of them must be made as a basis for another.

Where, according to the practice in some of the courts, a verdict is taken subject to the opinion of the court, and leave reserved, the unsuccessful party may move for a nonsuit, or for judgment thereon, as the case may be. Smith on Actions at Law, *159; 2 Tidd's Pr. (8th ed.), 935.

A new trial may be granted for various causes, usually fixed by statute, whether the error complained of be apparent upon the face of the record or not; while the other motions above specified will be sustained only for intrinsic causes, apparent upon the face of the record. See for distinction between motion for a new trial and motion for a *venire de novo,* Waterbury v. Miller, 13 Ind. App. 197, 41 N. E. 383.

2. The motion for a new trial should precede the motion in arrest of judgment,[1] unless the cause for a new trial be not discovered until after the motion in arrest is made.[2]

[1] Mason v. Palmerton, 2 Ind. 117; Philpot v. Page, 4 B. & C. 161; Rog-

ers v. Maxwell, 4 Ind. 243; Cincinnati &c. R. Co. v. Case, 122 Ind. 310, 23 N. E. 797; Hall v. Nees, 27 Ill. 411.

[8] Treberril v. Stamp, 2 Salk. 647; Hilliard's New Tr. (2d ed.), 37, § 28; Bul. Ni. Pri., 325, 326; Eckert v. Binkley, 134 Ind. 614, 33 N. E. 619.

A demurrer to the evidence will also waive a motion for a new trial, at least on some grounds. Stockwell v. State, 101 Ind. 1. But see Missouri Pac. R. Co. v. Goodrich, 38 Kan. 224, 16 Pac. 439.

The motion for a new trial should be made within the time prescribed by statute, but, in some instances, it may be made where there has been unavoidable delay, or the cause could not have been sooner discovered, and in some jurisdictions the matter is largely in the discretion of the trial court. So, in some jurisdictions it may be made either before or after judgment, while in others it must be made before judgment. 2 Elliott's Gen. Pr., § 990. See also notes in 49 L. R. A. 225 and 68 L. R. A. 126.

3. The causes for a new trial are usually prescribed by statute. Among the most common are: 1, errors and irregularities committed before or in the course of the trial, such as want of notice, irregular empanelling of the jury, erroneous admission or rejection of evidence, and erroneous instructions by the judge; 2, misconduct of the prevailing party; 3, misconduct of the jury; 4, verdict against the law or the evidence; 5, discovery of new evidence; 6, surprise on the part of the losing party; 7, excessive or (though rarely) inadequate damages.

3 Bouv. Inst., § 3273, *et seq.;* 3 Bl. Com., *387; Tidd's Pr. (8th ed.), 934, *et seq.;* Baylies on New Trials and Appeals, 502; Hilliard on New Trials, 20; 2 Elliott's Gen. Pr., § 988; 14 Ency. of Pl. & Pr., § 707.

There are, also, some cases in which, in many states, a new trial may, by express legislative enactment, be demanded as matter of right without assigning any causes therefor. The practitioner should consult the statute and decisions of his own state for the various grounds for new trials, and for what is necessary to be shown in support of each.

4. The motion for a new trial should state the grounds or causes therefor specifically and with reasonable certainty.

Dutch *et al.* v. Anderson *et al.*, 75 Ind. 35; Robinson v. Hadley, 14 Ind.

417. See also, Ottawa &c. R. Co. v. McMath, 91 Ill. 104; Newton v. Whitney, 77 Wis. 515, 46 N. W. 882.

5. Each party who desires a new trial should make his separate motion therefor; if a joint motion be not good as to all who join therein, it will not avail any one of them.

Feeney *et al.* v. Mazelin, 87 Ind. 226; Dorsey v. McGee, 30 Neb. 657, 46 N. W. 1018; Miller v. Adamson, 45 Minn. 99, 47 N. W. 452.

6. The motion for a *venire de novo* should, properly, precede that for a new trial,[1] and it cannot be made after judgment.[2]

[1] Jenkins v. Parkhill, 25 Ind. 473, 476.

[2] McClintock v. Theiss, 74 Ind. 200; Sloan v. Lick Creek &c. Co., 6 Ind. App. 584, 33 N. E. 997; Bennett v. Simon, 152 Ind. 490, 53 N. E. 649.

7. A *venire de novo* will be awarded only for some error or defect appearing on the face of the record, such as the wrongful allowance, or disallowance, of a challenge to a juror, or some imperfection in the verdict or finding.

Smith on Actions at Law, *160; Stephen on Pleading, *109; 3 Bouv. Inst., § 3300; 2 Tidd's Pr. (2d Am. ed.), 854; Brickley v. Weghorn, 71 Ind. 497; Witham v. Lewis, 1 Wils. 48; Douglas v. Indianapolis &c. Trac. Co., 37 Ind. App. 332, 335, 76 N. E. 892 (citing 2 Elliott's Gen. Pr., § 985).

8. To authorize a *venire de novo* for defect in the verdict, it must be so uncertain, ambiguous or defective that no judgment can be rendered thereon.

Carver v. Carver, 83 Ind. 368; Hadley v. Lake Erie &c. R. Co., 21 Ind. App. 675, 51 N. E. 337.

The defects for which this motion is most often granted in practice are, the failure of the verdict to find upon the whole issue, and the failure to assess damages. 2 Tidd's Pr., 922; Harden v. Fisher, 1 Wheat. (U. S.) 300, 4 L. ed. 96; White v. Bailey. 14 Conn. 271; Ridenour v. Miller, 83 Ind. 208; Jenkins v. Parkhill, 25 Ind. 473. But failure to find upon the whole issue in a special verdict would not be cause for *venire de novo* in some jurisdictions, while it gen-

erally would be in case of a general verdict. See Maxwell v. Wright, 160 Ind. 515, 67 N. E. 267. And where a proper general verdict is returned, the failure of the jury to make full and definite answers to interrogatories is not ground for a *venire de novo* in Indiana. Bedford &c. R. Co. v. Rainbolt, 99 Ind. 551.

9. A motion for a repleader is proper where it appears that in the course of pleading the parties have raised an immaterial issue, or so mistaken the true question in the case that a verdict upon the issue raised will not decide the cause either one way or the other.

Smith on Actions at Law, *162; Stephen on Pleading, *99; Gould's Pleading (3d ed.), 509. See also, 2 Andrews' Am. Law, 1497.

But the court will never grant a repleader, except when complete justice cannot be otherwise obtained. Goodburne v. Bowman, 9 Bing. 532. And never, it seems, to the party who tendered the immaterial issue. Gould's Pl., 510. And it is seldom resorted to, especially under the code system of pleading and practice.

10. A motion in arrest of judgment may be made by an unsuccessful defendant for *error appearing on the face of the record.*

Stephen on Pleading, *97; Smith on Actions at Law, *161; State v. George, 8 Ired. L. (N. Car.) 324, 49 Am. Dec. 393. See also, Ernsperger v. City of Mishawaka, 168 Ind. 253, 80 N. E. 543; 2 Ency. of Pl. & Pr., 793; 23 Cyc. 824-835.

It will not lie, it seems, for mere formal error, and the error must be apparent upon the face of the record, either in pleadings or verdict. 3 Bouv. Inst., §§ 3296, 3297; Gould's Pl., 493; 2 Andrews' Am. Law, 1495; Brown v. Commonwealth, 144 U. S. 573, 26 L. ed. 547, 12 Sup. Ct. 757, 759. The evidence cannot be considered in determining whether the motion should be sustained. Bond v. Dustin, 112 U. S. 604, 28 L. Ed. 835, 5 Sup. Ct. 296; Clary v. Hardesville Brick Co., 100 Fed. 915; Montpelier &c. R. Co. v. Machi, 74 Vt. 403, 52 Atl. 960.

11. The motion in arrest must, of course, be made before judgment is rendered;[1] but if made before the motion for a new trial, the right to make the latter is thereby waived.[2]

[1] Keller v. Stevens, 66 Md. 132, 6 Atl. 533; Brownlee, Admr., v. Hare, 64 Ind. 311; Bayless v. Jones, 10 Ind. App. 102, 37 N. E. 421.

[2] Mason v. Palmerton, 2 Ind. 117; McKinney v. Springer, 6 Ind. 453; School City v. Heinzman, 13 Ind. App. 195, 41 N. E. 464.

12. "Whatever is alleged in arrest of judgment," for defects in the pleadings, "must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea."

3 Blk. Com., *394; Gould's Pl. (3d ed.), 496; Passenger Conductors' &c. Co. v. Birnbaum (Pa.), 10 Atl. 138. Indeed, a demurrer will often lie when a motion in arrest will not, as many defects are cured by verdict. Jones v. Aksens, 116 Ind. 490, 19 N. E. 334; Alexander v. Alexander, 140 Ind. 555, 38 N. E. 855; People v. Swenson, 49 Cal. 388; United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. 1.

13. Judgment will be arrested for faults in the issue or verdict, as a general rule, only when the court cannot discover therefrom for which party judgment ought to be rendered.

Gould's Pl., 507; 3 Bouv. Inst., § 3297. Where judgment is arrested on this ground a *venire de novo* is usually awarded. Bac. Abr. *Verdict*, M.; Gould's Pl., 526.

14. A motion for judgment *non obstante veredicto* can ordinarily be made only by the plaintiff,[1] and must be for causes apparent upon the face of the record, showing that the matters pleaded or replied to, although found true, constitute neither a bar nor a defense to the action.[2]

[1] Rand v. Vaughan, 1 Bing. (N. C.) 767; 1 Abb. Law Dict., Tit. "Judgment;" Burnham v. New York &c. R. Co., 17 R. I. 544, 23 Atl. 638; German Ins. Co. v. Frederick, 58 Fed. 144, 7 C. C. A. 122; 23 Cyc. 778, 781. But see Plunkett v. Detroit Elec. Ry. Co., 140 Mich. 299, 103 N. W. 620, as to defendant having the right to such a judgment, and also as to judgment for defendant on pleadings, under statute, see Martindale v. Price, 14 Ind. 115; Brown v. Searle, 104 Ind. 218, 3 N. E. 871; 23 Cyc. 769, 779.

[2] Broom's Com., *234; Steph. Pl., *97; Freeman on Judgments (3d ed.), § 7. See also, McCloskey v. Indianapolis &c. Union, 67 Ind. 86, 33 Am. 76.

Such a judgment "is given," says Smith, in his Actions at Law, "when, upon an examination of the whole pleadings, it appears to the court that the defendant has admitted himself to be in the wrong, and has

taken issue upon some point which, though decided in his favor by the jury, still does not at all better his case." Actions at Law, *161. See also, Pim v. Grazebrook, 2 C. B. 429; Berry v. Borden, 7 Blackf. (Ind.) 384; State v. Commercial Bank, 6 S. & M. (Miss.) 218, 45 Am. Dec. 280; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. 732; 2 Andrews' Am. Law, 1496.

15. Where special findings of fact in answer to interrogatories are returned with the general verdict, the party against whom the verdict is rendered should, if he thinks the special findings sufficient, move for judgment on such findings, notwithstanding the general verdict; for the question of the right to such a judgment cannot be presented for the first time on appeal; nor is it presented by a motion for a new trial.

Tritlipo v. Lacy, 55 Ind. 287; Terre Haute &c. R. Co. v. Clark, 73 Ind. 168. See also, Elliott's App. Proc., § 752.

But such a motion is not waived by filing a motion for a new trial before it is ruled upon. Voris v. City Building &c. Ass'n, 20 Ind. App. 630, 50 N. E. 779. And it is held that neither a motion for such judgment nor for judgment *non obstante veredicto* is inconsistent with a motion for a new trial. Chicago &c. Co. v. Dimick, 96 Ill. 42; Indianapolis &c. Co. v. McCaffrey, 62 Ind. 552; Fisk v. Henarie, 14 Ore. 29; 13 Pac. 193. So, it is held that the filing of a demurrer to the evidence does not prevent the making of a motion in arrest of judgment. Bish v. Van Cannon, 94 Ind. 263.

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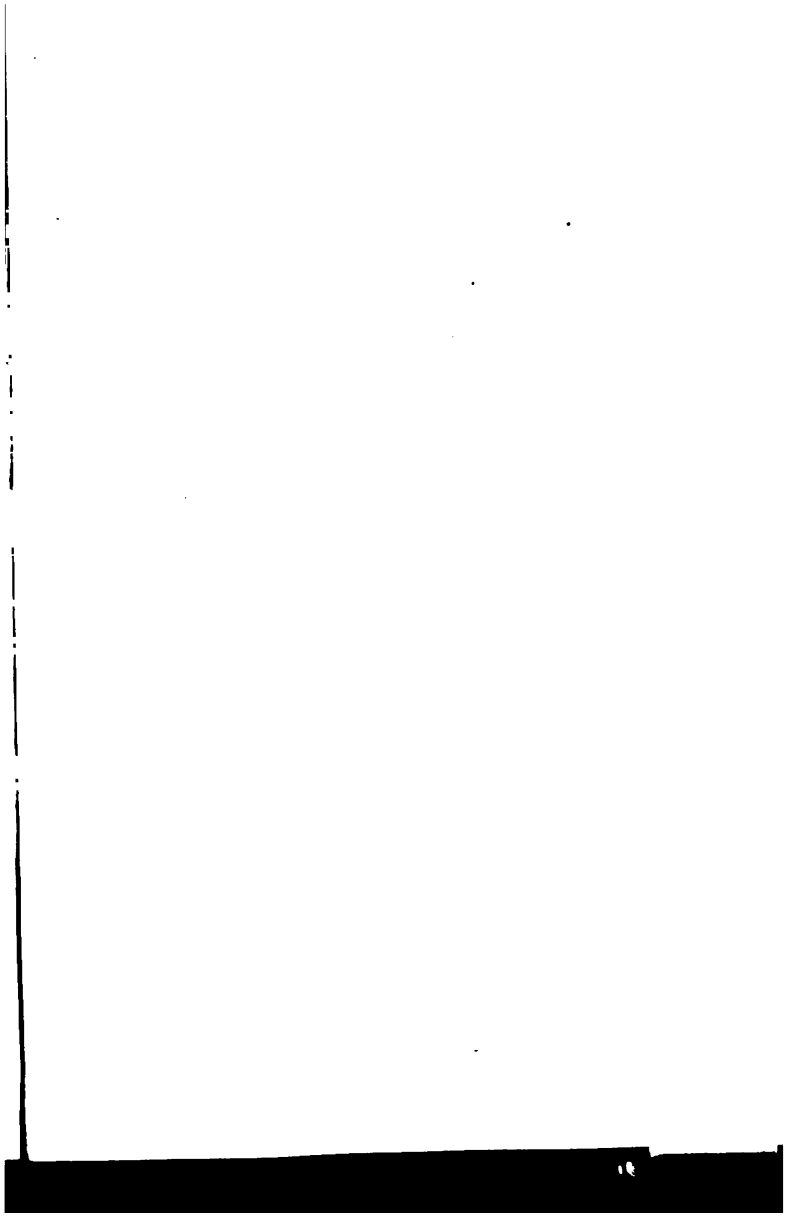
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